In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-69

ROBERT A. PANORA, REGISTRAR OF MOTOR VEHICLES OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

v.

DONALD E. MONTRYM, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Jurisdictional Statement.

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
MITCHELL J. SIKORA, JR.,
STEVEN A. RUSCONI,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1020
Attorneys for Appellant.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Introduction

Pursuant to Supreme Court Rule 15, the Registrar of Motor Vehicles for the Commonwealth of Massachusetts submits the present Jurisdictional Statement in appeal from a judgment of a three-judge federal district court for the District of Massachusetts.

In the judgment below, a divided district court invalidated the Massachusetts statute imposing a 90-day suspension of a driver's license as a sanction for refusal to take a chemical test or breath analysis test upon arrest for drunken driving. The majority of the district court asserted that the statute violated the Due Process Clause of the Fourteenth Amendment because it omitted a pre-suspension hearing opportunity at which the charged driver might dispute the fact that he had refused to take a test. The dissenting judge took the position that hearing opportunities at the time of suspension and promptly afterward satisfied the Fourteenth Amendment.

The present appeal presents a substantial constitutional issue warranting plenary consideration by the Court because (1) 12 states enforce similar statutory provisions; (2) the prior hearing issue has divided lower federal and state courts; (3) the area of chemical testing specifically — and implied consent laws generally — presents a major unresolved application of evolving prior hearing doctrine; (4) the decision below discloses a misapplication of the doctrine enunciated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Dixon* v. *Love*, ____ U.S. ____, 45 U.S.L.W. 4447 (May 16, 1977).

Consequently, the appellant Registrar urges the Court to note probable jurisdiction or, in the alternative, to grant summary reversal of the judgment of the district court.

Opinions Below

The opinions and judgment of the district court are currently unreported. They are reproduced in Appendices A (pages 1a-23a) and B (pages 24a-26a) to this statement.

Jurisdiction

The appellant Registrar invokes the jurisdiction of the Court upon the authority of 28 U.S.C. § 1253 for direct appeal from a decision by a three-judge district court. Decisions demonstrating the jurisdiction of the Court include *Dixon* v. *Love*, ____ U.S. ____, 45 U.S.L.W. 4447 (May 16, 1977), and *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

Pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3), the plaintiff-appellee Donald E. Montrym brought the present class action for declaratory and injunctive relief against the enforcement of the Massachusetts statute authorizing the suspension of a driver's license for refusal to take a chemical or breath analysis test upon arrest for drunken driving. Massachusetts General Laws (G.L.) c. 90, § 24(1)(f). The plaintiff's theory was that the statute's omission of a pre-suspension hearing opportunity violated the Due Process Clause.

Pursuant to 28 U.S.C. §§ 2281 and 2284, as then effective, a three-judge court was convened.

On May 4, 1977, the district court entered final judgment declaring the statute unconstitutional and permanently enjoining its enforcement. On May 13, 1977, the Registrar filed his Notice of Appeal in the district court.

Statute Involved.

G.L. c. 90, § 24(1)(f), of the Massachusetts Code provides as follows:

> (f) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access,

or upon any way or in any place to which members of the public have access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be made on a form approved by the registrar, and shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief, as defined in section one of chapter ninety C, or by the person authorized by him and shall be sent forthwith to the registrar. Upon receipt of such report,

the registrar shall suspend any license or permit to operate motor vehicles issued to such person under this chapter or the right of such person to operate motor vehicles in the commonwealth under section ten for a period of ninety days.

A copy of the judgment of the district court is included in Appendix B to this Statement (pages 24a-26a).

A copy of the appellant Registrar's Notice of Appeal is attached to this Statement as Appendix C (page 27a).

Question Presented

Whether a statute imposing a uniform temporary suspension of a driver's license for his refusal to take a chemical or breath analysis test upon arrest for drunken driving violates the Due Process Clause of the Fourteenth Amendment by providing a prompt post-suspension hearing rather than a pre-suspension hearing at which the driver may dispute that he refused to take the test.

Statement of the Case

On the evening of May 15, 1976, the plaintiff-appellee Donald Montrym, a licensed Massachusetts driver, was involved in a collision between his station wagon and a motorcycle, and was arrested shortly afterward on the charge, among others, of driving under the influence of intoxicating liquor (Appendix A, 3a). He accompanied the

arresting officer to a station and declined to take a breathalyzer test. *Id.*

The police executed the statutorily required Report of Refusal to Submit to a Chemical Test. *Id.* The Report must record the driver's refusal and must be prepared immediately by the officer receiving the refusal; it must be signed and sworn to by that officer; it must be endorsed by a third person witnessing the refusal; and it must be endorsed by the appropriate police chief (Appendix A, 2a, n. 1). Moreover, the Report must set out the grounds for the officer's belief that the arrestee had been driving under the influence of intoxicating liquor (Appendix A, 2a, n. 1).

On May 25, the Registrar received the Report from the local police and, as required by G.L. c. 90, § 24(1)(f), on June 11 suspended Montrym's license (Appendix A, 4a, 5a).

Montrym forewent the opportunity of an informal hearing with the Registrar at the time of license surrender and began the process of administrative appeal (Appendix A, 5a-6a). Before its conclusion, he commenced this lawsuit and on July 9, 1976, secured a preliminary injunction ordering the return of his license.

On March 25, 1977, the district court delivered its opinions on the merits and on May 4 entered final judgment declaring the state law unconstitutional and permanently enjoining its enforcement (Appendix A, 17a, and Appendix B, 24a-25a).

The Registrar now appeals (Appendix C, 27a).

The Question Presented is Substantial

I. Introduction: The Appeal Involves an Extension of Prior Hearing Doctrine into an Area of the State's Police Power which This Court has Never Entered.

Every state imposes sanctions against the license or registration of a driver who is arrested for drunken driving and who refuses to cooperate in a prompt, scientific test for intoxication.[1] These statutes represent the state's attempt

[1] These statutes are known elliptically as the "prior consent" laws. In taking to the road the driver is deemed to have consented to such tests. This form of statute was upheld against constitutional attack as a violation of the privilege against self-incrimination and of the right against unreasonable search and seizure in *Schmerber* v. *California*, 384 U.S. 757 (1966). For general discussion and analysis of implied consent provisions, see Note, Motor Vehicles: A New Challenge to the Implied Consent Law, 27 Okla. L. Rev. 525 (1974); and Annot., Necessity of Notice and Hearing Before Revocation or Suspension of Motor Vehicle Driver's License, 60 A.L.R. 3d 361 (1974).

The state statutes are the following:

Alaska Stat. §§ 28.35.031-.032 (1975);
Ariz. Rev. Stat. § 28-691(d)-(e) (1976);
Ark. Stat. Ann. § 75-1045(d) (Supp. 1975);
Cal. Veh. Code § 13353(b)-(c) (1971);
Col. Rev. Stat. § 13-5-30 (1971);
Conn. Gen. Stat. Ann. Tit. 14, § 227b (Supp. 1976);
Del. Code Tit. 21, § 2742 (1974);
D.C. Code § 40-1005 to 1006 (Supp. 1976);
Fla. Stat. Ann. § 322.261(d)-(e) (1975);
Ga. Code Ann. Tit. 68, § 1625.1(b)-(c) (1972);
Haw. Rev. Stat. § 286-155 (1968);
Idaho Code § 49-352 (1976);
Ill. Rev. Stat. Tit. 95 1/2, § 11-501.1(d) (1976);
Ind. Code Ann. Tit. 9, § 4-4.5-4 (1975);
Iowa Code Ann. §§ 321.137-138 (Supp. 1976);
Kan. Stat. § 8-1001 (1975);
Ky. Rev. Stat. § 186.565 (Supp. 1976);

to deter and to detect drunken driving in the most effective manner yet devised. This appeal brings to the Court the question whether the Due Process Clause compels the states to include a prior hearing procedure within these programs, rather than to permit immediate suspension with a subsequent hearing, as the Massachusetts law has provided.

La. Rev. Stat. Ann. §§ 32-667 to 668 (Supp. 1976);
Me. Rev. Stat. Tit. 29, § 1312(2) (Supp. 1976);
Md. Ann. Code Art. 66 1/2, § 6-205.1 (Supp. 1976);
Mass. Gen. Laws Ann. c. 90, § 24(1)(f) (Supp. 1976);
Mich. Stat. Ann. § 257.625(e) (Supp. 1976);
Minn. Stat. Ann. § 169.123 (Supp. 1973);
Miss. Code Ann. §§ 63-11-21 to 23 (1972);
Mo. Ann. Stat. § 564.441 (Supp. 1976);
Mont. Rev. Codes Ann. §§ 32.2142.1-2 (Supp. 1972);
Neb. Rev. Stat. § 39-669.16 (1960);
Nev. Rev. Stat. § 484.385 (1971);
N.H. Rev. Stat. Ann. § 262-A-69e (Supp. 1972);
N.J. Rev. Stat. § 39.4-50.4 (Supp. 1976);
N.M. Stat. Ann. § 64-22-2.12 (Supp. 1971);
N.Y. Veh. & Traf. Law § 1194 (McKinney Supp. 1972);
N.C. Gen. Stat. § 20-16.2 (1975);
N.D. Cent. Code § 39-20-04-5 (Supp. 1975);
Ohio Rev. Code Ann. § 4511.19.1 (Supp. 1972);
Okla. Stat. Tit. 47, §§ 753-4 (1975);
Or. Rev. Stat. § 482.540 (1971);
Pa. Stat. Ann. Tit. 75, §§ 1447, 1550 (1977);
R.I. Gen. Laws Ann. § 31-27-2.1 (1969);
S.C. Code § 46-344(d) (Supp. 1972);
S.D. Compiled Laws Ann. §§ 32-23-10 to 32-23-11 (1969);
Tenn. Code Ann. § 59-1045 (Supp. 1976);
Tex. Civ. Code Ann. § 6701*l*-5(2) (1977);
Utah Code Ann. § 41-6-44.10(c) (1953);
Vt. Stat. Ann. Tit. 23, § 1205 (Supp. 1976);
Va. Code § 18.2-268 (Supp. 1972);
Wash. Rev. Code Tit. 46, § 20.308(3) (Supp. 1976);
W. Va. Code § 17C-5A-3 (1975);
Wis. Stat. Ann. § 343.305(7) (a) (1971);
Wyo. Stat. §§ 31-247.2(d) to 247.3 (Supp. 1976).

The issue is significant for several reasons. First, it involves the extension of prior hearing doctrine into an exercise of state police power never before considered by the Court.[2] The two most recent prior hearing decisions of the Court, *Mathews* v. *Eldridge*, 424 U.S. 319, 333-335 (1976), and *Dixon* v. *Love*, ___ U.S. ___, ___, 45 U.S.L.W. 4447, 4449 (May 19, 1977), teach that the right to a prior hearing will depend upon (1) the substantiality of the endangered private interest in property or liberty; (2) the risk or likelihood of an erroneous deprivation of that interest for lack of a prior hearing; and (3) the countervailing governmental interest, including both the positive accomplishment of policy goals as well as the freedom of government from fiscal and administrative burdens. A fourth criterion weighed in a number of cases has been the adequacy of a subsequent hearing for compensatory or prompt specific relief for the affected party.[3] The recent

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[2] Since the decision of *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969), this Court has sought to define a person's right to a prior hearing in a variety of important circumstances, either in which the government took property or liberty interests from the person or in which one person took them from another through the process of the courts. The effort has been recurrent and difficult.

Compare *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 610, 618 (1974) (permitting statutory mortgage on lien holder's *ex parte* sequestration of debtor's household goods), with *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (striking down a state law scheme for *ex parte* attachment of commercial bank accounts).

And see, *e.g.*, the comments of Mr. Justice Blackmun, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 614-620 (dissenting opinion), and of Mr. Justice Marshall, *Arnett* v. *Kennedy*, 416 U.S. 134, 207-212 (1974) (dissenting opinion).

With the Court's most recent decisions, discussed below, a general agreement appears to have coalesced for the criteria for a constitutionally mandatory prior hearing.

[3] See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976); and *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 609-610 (1974).

and unanimous (8-0) application of these principles in *Dixon* v. *Love* suggests the Court's satisfaction with this doctrine and a stabilization of its standards.

The extension of the doctrine to the states' treatment of their citizens' driving rights creates an inevitable contest between the police power and personal interests. The Court has rendered two decisions in this setting, *Bell* v. *Burson*, 402 U.S. 535 (1971) (a typical financial responsibility statute), and *Dixon* v. *Love*, *supra*, (a typical habitual offender statute). The present appeal for the first time presents the prior hearing issue for application to the states' implied consent programs. Consequently, the question is substantial and new to the Court.

II. A Significant Number of States Administer Implied Consent Programs Without the Opportunity for a Prior Hearing.

The question presented is one of widespread importance. Presently thirteen[4] states provide for license suspension without a prior hearing on the fact of the arrested driver's refusal of tests. Six of these state statutes have never been subjected to constitutional challenge.[5] Four have been upheld by state courts against due process attack.[6] And two have received indirect affirmation from state supreme

[4]Including Massachusetts.

[5]Ala. Code Tit. 36, § 154 (Supp. 1973); Alaska Stat. § 28.35.031 (1975); Iowa Code Ann. §§ 321.137-138 (Supp. 1976); Miss. Code Ann. §§ 63-11-21 through 23 (1972); Mont. Rev. Codes Ann. § 32.2142.1-2 (Supp. 1972); and R.I. Gen. Laws Ann. § 31-27-2.1 (1969).

[6]Missouri, Mo. Ann. Stat. § 564.441, upheld in *Jones* v. *Schaffner*, 509 S.W. 2d 72 (Mo. 1974); New Hampshire, N.H. Rev. Stat. Ann. § 262-A-69e (Supp. 1972), upheld in *Daneault* v. *Clarke*, 113 N.H. 481, 309 A. 2d 884 (1973); New Mexico, N.M. Stat. Ann. § 64-22-2.12 (1975), upheld in *In re McCain*, 84 N.M. 657, 506 P. 2d 1204 (1973); New York, N.Y. Veh. & Traf. Law § 1194 (McKinney Supp. 1972), upheld in *Ballou* v. *Kelley*, 12 Misc. 2d 178, 176 N.Y.S. 2d 1005 (1958). *Cf. Brown* v. *Tofany*, 33 A.D. 2d 984, 307 N.Y.S. 2d 268 (1970).

courts.[7] This Court's decision of the question presented would settle the validity of all thirteen state programs.

III. The Question has Divided Lower Federal and State Courts.

The constitutionality of implied consent suspensions without prior hearing has in recent years generated a split of authority between federal and state courts. Federal courts have struck down such provisions in several instances. See *Holland* v. *Parker*, 469 F. 2d 1013, 1016 (8th Cir. 1972); *Slone* v. *Kentucky Department of Transportation*, 379 F. Supp. 652 (E.D. Ky. 1974); and *Chavez* v. *Campbell*, 397 F. Supp. 1285 (D. Ariz. 1973). At the same time, state courts have sustained the statutes.[8] A decision of this Court would put an end to these divergent trains of law.

[7]Delaware, Del. Code Tit. 21, § 2742 (1974), in *Broughton* v. *Warren*, 281 A. 2d 625 (Del. Ch. 1971); Maine, Me. Rev. Stat. Tit. 29, § 1312(2) (Supp. 1976), in *Opinion of the Justices*, 255 A. 2d 643 (Me. 1969).

[8]See nn. 6 and 7, *supra*. Other state courts have indicated that a prior fact finding hearing does not amount to a constitutional requirement. *E.g.*, *Campbell* v. *Superior Court*, 106 Ariz. 542 (1971); *Popp* v. *Motor Vehicle Dept.*, 211 Kan. 763 (1973); *Harrison* v. *State Dept. of Public Safety*, 298 So. 2d 312 (La. App. 1974); *Daly* v. *State Dept. of Highways*, 296 Minn. 238 (1973), *cert. den.* 414 U.S. 909 (1973); *Glass* v. *Commonwealth*, 460 Pa. 362, 333 A. 2d 768 (1975), and *Commonwealth* v. *Abraham*, 7 Pa. Com. 535 (1973); and *Metcalf* v. *Dept. of Motor Vehicles*, 11 Wash. App. 819 (1974).

IV. The District Court Majority Misapplied the Prior Hearing Principles Enunciated by This Court in Mathews v. Eldridge and Dixon v. Love.

The two-judge majority of the district court analyzed the Massachusetts statute in light of *Mathews* v. *Eldridge*. The dissenting circuit court judge applied the same standards and sharply differed from the conclusions of the majority (dissenting opinion of Campbell, J., Appendix A, 17a-23a). This Court's subsequent decision in *Dixon* v. *Love* confirms the view of the dissenting judge that the present decision is a misapplication of Fourteenth Amendment principles.[9]

A. *The Substantiality of the Private Interest in a Driver's License.*

The Court and the present parties have consistently acknowledged that a driver's license is a property or liberty interest entitled to some form of due process protection. *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). In *Dixon* the Court restates this threshold conclusion, but then places the license interest in a wider perspective and concludes that its weight

[9]The district court delivered its opinions on March 25, 1977, and therefore did not have the benefit of *Dixon* v. *Love*, announced on May 16, 1977. Initially, after entry of judgment below, the Registrar moved the district court to stay judgment pending appeal to this Court. The district court denied this motion. Subsequently, after announcement of *Dixon* v. *Love*, the Registrar moved the district court again to stay judgment and to modify judgment in light of *Dixon* v. *Love*. Both the Registrar and the plaintiff Montrym have filed supplemental memoranda regarding those motions and the application of *Dixon*. With the approach of the deadline for filing the present Jurisdictional Statement, the district court has not responded to those motions and arguments.

is not so great as to require a prior hearing as constitutionally necessary for the indefinite revocation of a driver's license. By contrast, the district court here has held a prior hearing to be constitutionally necessary for the suspension of a driver's license for 90 days, notwithstanding the availability of an informal hearing at the time of license surrender (Appendix A, 10a, n. 11) and the state's highway safety objectives (Appendix A, 13a-14a).[10] In short, the majority assigned the license a measure of importance which conflicts directly with the *Dixon* calculus.

B. *The Risk of Factual Error.*

The district court cited the possibility of clerical and other errors in the police report to the Registrar. The majority was not satisfied with the certifying requirement of (a) a written report by an officer making the arrest and receiving the refusal, (b) the endorsement of the report by a second witness, and (c) the endorsement of the appropriate superior officer (Appendix A, 11a-13a).

In *Dixon* a corresponding risk of error arose in the Illinois scheme. The Secretary of State there administered a suspension-and-revocation program on the basis of records kept by him and apparently forwarded by local courts. The relevant statute empowered him to impose license sanctions upon the basis of "his records or other sufficient evidence" showing patterns of driver misconduct. The Secretary, in turn, had developed a point system for various classes of traffic offenses, with larger amounts of points assigned to more severe offenses. Point levels were calibrated with various lengths of suspension and with revocation. The

[10]The dissenting judge warned against the inflation of the license interest (Appendix A, 20a).

Secretary administered a system which (1) recorded traffic offenses, (2) converted them to respective and cumulative point totals, (3) converted the point totals to corresponding suspensions, and (4) converted the requisite number of suspensions to a revocation. 45 U.S.L.W. at 4448.

In the case of the driver Love, the Secretary had found that he had committed three moving offenses in one 12-month span so as to warrant a suspension and, further, that this suspension was his third in 10 years so as to require a revocation.

The Illinois system required considerable recordkeeping and computation. Nonetheless, the Court concluded that "the risk of an erroneous deprivation in the absence of a prior hearing is not great. . . . Of course, there is the possibility of clerical error, but written objection will bring a matter of that kind to the Secretary's attention." 45 U.S.L.W. at 4449.[11]

Due process doctrine is properly shaped to the general, and not the exceptional, case. *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976). In the Massachusetts implied consent procedure the operative facts are generally likely to be accurate. They constitute a single, discrete incident verified in writing by two witnesses and easily correctible for clerical error before and promptly upon any suspension. The police report must set out grounds for the officer's belief of intoxicated driving, must relate the refusal of the test, must be signed and sworn to by the officer, and must be endorsed by another witness to the refusal and by a superior officer. The assumption that the Massachusetts police report will be reliable in the vast majority of cases is reasonable.

[11]The dissenting judge below made the identical observation of the implied consent procedure (Appendix A, 18a-20a).

Moreover, the record below will show no evidence to have been offered to demonstrate the need for a prior hearing in any instance other than this one. By contrast, in *Eldridge*, the Court was supplied with various statistical estimates of the likelihood of factual error, 424 U.S. 319, 346-347, found their adequacy "suspect," and rejected their value as proof of the need for a prior hearing. The same result should follow here all the more forcefully in the total absence of evidence of the likelihood of error.

C. *The Governmental Interest.*

In *Dixon* the Court affirmed the two elements of the public interest equally important to implied consent programs: (1) "the important public interest in safety on the roads and highways" served by "a program designed to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the safety of others;" and (2) "the substantial public interest in administrative efficiency" impeded "by the availability of a pretermination hearing in every case." 45 U.S.L.W. at 4450.

In this last consideration the Court added its preference for uniform and automatic, rather than individualized and discretionary, processes for the subject of driver's license sanctions.

> Giving licensees the choice . . . to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full administrative hearings.
>
> . . . . . .
>
> The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment

> among similarly situated drivers. The approach [of individualized prior hearings] would have the contrary result of reducing the fairness of the system requiring a necessarily subjective inquiry in each case as to a driver's [culpability]. 45 U.S.L.W. at 4450.

In the implied consent setting the same values are at work. The uniformity and certainty of license suspension for refusal of intoxication tests serves the state's positive objectives to deter drunken driving in the first place and then to detect it upon its occurrence. The same uniformity and certainty free the government from the driver's dilatory and evasive use of an additional pre-suspension hearing process, from the concomitant cost of human and financial resources, and from the possibility of uneven results from driver to driver.[12] These considerations draw added force from the availability of a reasonably prompt subsequent hearing.[13]

In sum, the analysis and conclusion of the district court cannot stand in the wake of *Dixon* v. *Love* and should not restrict an analogous and important exercise of the state's police power.

[12] Once again the dissenting judge anticipated the Court's reasoning in *Dixon* in this regard (Appendix A, 21a-22a).

[13] An informal hearing is available upon license surrender (Appendix A, 10a, n. 11). A formal statutory hearing is available reasonably soon afterward for dispute of the test refusal. Massachusetts General Laws (G.L.) c. 90, § 24(1)(g) [immediately following the subject provision].

Conclusion.

The question presented by this Statement is substantial. The appellant respectfully urges the Court to note probable jurisdiction and set the case down for argument, or to reverse summarily the decision of the district court.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
MITCHELL J. SIKORA, JR.,
STEVEN A. RUSCONI,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1020
Attorneys for the Appellant.

Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DONALD E. MONTRYM,)
individually and in behalf of)
all others similarly situated,)

v.) CIVIL ACTION
No. 76-2560-F

ROBERT A. PANORA, Registrar)
of Motor Vehicles, and his)
successors in office.)

Before *Campbell*, Circuit Judge,
Tauro and *Freedman*, District Judges.

Opinion

March 25, 1977

FREEDMAN, D.J.

Plaintiff, Donald E. Montrym, brings this suit, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), on behalf of himself and others similarly situated, challenging the constitutionality of the Massachusetts implied consent statute, M.G.L. c. 90 § 24(1)(f). That statute provides for an automatic ninety-day suspension of one's driver's license for refusal to take a chemical test or analysis of one's breath after having been arrested for operating a motor vehicle on a public way while under the influence of intoxicating

liquor.[1] A three-judge court has been convened to hear this case in accordance with 28 U.S.C. §§ 2281 and 2284.[2]

Plaintiff contends that the statute violates due process because it fails to provide any type of hearing or procedure

[1]M.G.L. c. 90, § 24(1)(f) states:

Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report or refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be made on a form approved by the registrar, and shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief, as defined in section one of chapter ninety C, or by the person authorized by him and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person under this chapter or the right of such person to operate motor vehicles in the commonwealth under section ten for a period of ninety days.

[2]The complaint in this case was filed prior to the effective date of Public Law 94-381, repealing 28 U.S.C. § 2281 and amending 28 U.S.C. § 2284. The new statute would make it unnecessary to convene a three-judge court to enjoin the enforcement of a state statute of the type involved in the present action on the ground of its unconstitutionality.

whereby a licensee may respond to the state's assertion that he has refused to take a chemical test before his license is suspended by the Registrar of Motor Vehicles. Plaintiff now moves for a partial summary judgment[3] declaring M.G.L. c. 90 § 24(1)(f) unconstitutional on its face and/or as applied as well as an injunction against its enforcement.[4] For the reasons set forth below we hold that the Massachusetts implied consent statute violates due process and therefore grant plaintiff's motion for partial summary judgment and injunctive relief.

Facts

On May 15, 1976, at approximately 8:15 p.m., the plaintiff, while driving his station wagon upon a public way in the Town of Acton, was involved in a collision with a motorcycle. At approximately 8:30 p.m., the plaintiff was arrested by an Acton police officer and charged with operating under the influence of intoxicating liquor, driving so as to endanger the lives or safety of the public, and failing to have the motor vehicle registration in his possession. The police officer issued a citation to the plaintiff pursuant to M.G.L. c. 90 § 1. The plaintiff was then brought to the Acton police station where he declined a police request to take a breathalyzer test. He alleges he was not informed that his license would be suspended upon such refusal. The police officer's Report of Refusal to Submit to a Chemical Test (Report) lists the time of refusal

[3]Plaintiff also seeks individual compensatory and punitive damages as well as reasonable attorneys' fees. The court expressly reserved judgment on the damages issue pending a decision on the merits.

[4]Plaintiff has already obtained a restraining order issued by a single member of this court prior to the convening of the three-judge court. That order, dated July 9, 1976, enjoined the defendant from revoking the plaintiff's driver's license on account of his alleged failure to take a breathalyzer test in accordance with the statute until further order by the court. There has been no such further order prior to this decision.

as 8:45 p.m. There is some question as to what next transpired. Plaintiff asserts that he subsequently requested and was wrongfully denied an opportunity to take the test.[5] The Report makes no mention of this. In any case, it is agreed that no test was administered.

On May 25, 1976, the defendant Registrar of Motor Vehicles of the Commonwealth of Massachusetts, Robert A. Panora, received the Report from the Acton police. The Report was made on the form approved by the Registrar which complied with the statutory requirements of M.G.L. c. 90 § 24(1)(f).[6]

On June 2, 1976,[7] a hearing was held in the appropriate state district court on a criminal complaint alleging the three offenses. The driving under the influence charge was dismissed. The plaintiff was found not guilty on the driving to endanger charge and guilty on the registration charge for which he was fined $15.

On the same day, June 2, 1976, plaintiff's attorney wrote the Registrar requesting a stay of any possible action that might be taken with respect to the plaintiff's license. This letter was received by the Registrar on June 3, 1976.

[5] In support of this assertion, plaintiff points to an ambiguous statement presumably made by the state court on the face of the complaint that the breathalyzer test was "refused when requested" within one-half hour of the plaintiff's arrival at the police station. However, the present action does not require us to determine either the significance or exact meaning of that statement.

[6] *See n. 1, supra.*

[7] Although the complaint refers to June 8, 1976 as the date of trial in state court, the documents submitted and agreed to by both parties, including a dated photocopy of the dismissal of the first charge, as well as the chronological order of subsequent events, leads to the logical conclusion that the trial did in fact occur on June 2, 1976.

Nevertheless, on June 7, 1976, the defendant Registrar suspended the plaintiff's driver's license on the basis of its receipt of the Report as required by M.G.L. c. 90 § 24(1)(f). On June 11, 1976, the Registrar responded to the plaintiff's attorney's letter of June 2, 1976 and informed him that plaintiff's license had already been suspended.

On June 7, 1976, plaintiff's attorney wrote the Board of Appeal on Motor Vehicle Liability Policies and Bonds for a hearing pursuant to M.G.L. c. 90 § 28,[8] stating that he had not refused to submit to a breathalyzer test within the meaning of M.G.L. c. 90 § 24(1)(f). This letter was received by the Board of Appeal on June 8, 1976. Plaintiff surrendered his driver's license, as required, to the Registrar on June 8, 1976.

[8] M.G.L. c. 90, § 28 provides:

Any person aggrieved by a ruling or decision of the registrar may, within ten days thereafter, appeal from such ruling or decision to the board of appeal on motor vehicle liability policies and bonds created by section eight A of chapter twenty-six, which board may, after a hearing, order such ruling or decision to be affirmed, modified or annulled; but no such appeal shall operate to stay any ruling or decision of the registrar. In the administration of the laws and regulations relative to motor vehicles, the registrar, or any person by him authorized, may summon witnesses in behalf of the commonwealth and may administer oaths and take testimony. The board or the registrar may also cause depositions to be taken, and may order the production of books, papers, agreements and documents. Any person who swears or affirms falsely in regard to any matter or thing respecting which an oath or affirmation is required by the board or the registrar or by this chapter shall be deemed guilty of perjury. The fees for the attendance and travel of witnesses shall be the same as for witnesses in civil actions before the courts, and shall be paid by the commonwealth upon the certificate of the registrar filed with the comptroller. The supreme judicial or superior court may, upon the application of the board or the registrar, enforce all lawful orders of the board or the registrar under this section.

On June 10, 1976, plaintiff's attorney received a reply from the Board of Appeal, dated June 8, 1976, which requested plaintiff to complete certain enclosed forms in duplicate. The forms were completed and mailed back to the Board on the same day. They were received by the Board on June 11, 1976. On June 24, 1976, the Board of Appeal notified plaintiff that he could have a hearing on July 6, 1976.

On June 28, 1976, plaintiff, by his attorney, demanded the return of his driver's license from the Registrar on the basis that the state court had allegedly made a "specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one," that he was "acquitted" of driving under the influence of intoxicating liquors, and that suspension of his license "without affording him a prior hearing is a patent deprivation of his liberty and property without due process . . . in contravention of the Fourteenth Amendment of the United States Constitution."

Although the Registrar refused this demand, Mr. Montrym's license was returned on July 15, 1976 pursuant to an order issued by a single member of this court on July 9, 1976.[9]

Conclusions of Law

The state may not confiscate one's driver's license without affording the licensee procedural due process. *Bell* v. *Burson*, 402 U.S. 535, 539 (1971); *Raper* v. *Lucey*, 488 F. 2d 748 (1st Cir. 1973); *Pollard* v. *Panora*, 411 F. Supp. 580

[9]This order was issued prior to the convening of the three-judge court. *See n. 4, supra.*

(D. Mass. 1976). However, due process is a flexible concept. *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell* v. *Burson, supra* at 540. The question which thus remains in the present case is what process is due. *Morrissey* v. *Brewer, supra* at 481.

In *Bell* v. *Burson, supra*, the Supreme Court held that Georgia's Motor Vehicle Safety Responsibility Act violated due process. The statute required the suspension of the driver's license of an uninsured motorist involved in an accident unless he posted security to cover the amount claimed by an aggrieved party. There were several statutory exceptions. No suspension would occur if, prior to suspension, either the injured party executed a release from liability or there was an adjudication of nonliability. Either occurrence would also lift a suspension once it had been imposed. However, the hearing which was provided prior to suspension excluded consideration of the motorist's fault or liability for the accident. The Supreme Court concluded that:

> [s]ince the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.

Id. at 541.

In considering what process was due, the Court rejected Georgia's argument that a post suspension hearing would be sufficient.

> . . . it is fundamental that except in emergency situations (and this is not one) [footnote omitted] due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective. [Citations omitted; emphasis in original.]

Id. at 542.

Other federal courts have applied the *Bell* decision to facts similar to those presented here. In *Holland* v. *Parker*, 354 F. Supp. 196 (D. S.D., C.D. 1973), and *Chavez* v. *Campbell*, 397 F. Supp. 1285 (D. Ariz. 1973), three-judge courts held the South Dakota and Arizona implied consent statutes to be unconstitutional because they failed to provide a pre-suspension hearing.[10] While recognizing a public interest in keeping drinking drivers off the road, the courts concluded that the automatic suspension of one's license for failure to take a breathalyzer test did not further this goal since "a drunk who takes the breath test continues to drive and keeps his license, while a driver who may be completely sober, and who refuses to take the test finds himself excluded from the highways." *Chavez* v. *Campbell*, *supra* at 1288. Both courts rejected the argument that the situation presented was an emergency or so extraordinary as

[10]Several state courts have, however, reached a contrary conclusion, holding that the failure to provide a pre-suspension hearing did not render a state implied consent statute unconstitutional. *E.g.*, *Jones* v. *Schaffner*, 509 S.W. 2d 72 (Mo. 1974); *Daneault* v. *Clarke*, 113 N.H. 481, 309 A. 2d 884 (1973); *Popp* v. *Motor Vehicle Department*, 211 Kan. 763, 508 P. 2d 991 (1973). *Cf. Broughton* v. *Warren*, 281 A. 2d 625 (Del. Ch. 1971). *But cf. Garagliano* v. *Secretary of State*, 62 Mich. Ap. 1, 233 N.W. 2d 159 (1975).

to justify postponement of due process. Both courts noted that the license of a driver who had submitted to a chemical test and was ultimately convicted of driving while under the influence of intoxicating liquor would not have been suspended until he had been afforded a full trial. This was found to militate against the contention that summary license suspension was "necessary to facilitate immediate removal of drunks from the road." *Id.*; *accord*, *Slone* v. *Kentucky Department of Transportation*, 379 F. Supp. 652, 657 (E.D. Ky. 1974) (single judge striking down Kentucky implied consent statute), *aff'd on other grounds*, 513 F. 2d 1189 (6th Cir. 1975).

The defendant argues that *Holland* and *Chavez* are inapposite to the present case for two reasons. First, those decisions were rendered prior to the Supreme Court's decision in *Mathews* v. *Eldridge*, *supra*. And second, the interest presently asserted by the Commonwealth is not only in removing drinking drivers from its roads, but is also in obtaining the results of the breathalyzer test for valuable use as evidence to aid in convicting those charged with driving while under the influence of intoxicating liquor. We do not find either of these distinctions persuasive enough to require us to reach a different result than that reached in *Holland* and *Chavez*.

In *Mathews* v. *Eldridge*, *supra*, the Supreme Court reaffirmed the validity of *Bell* v. *Burson*, at least on its facts.

> . . . *Bell* v. *Burson* . . . held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take

the form of a full adjudication of the question of liability."

Id. at 334.

In *Eldridge*, the Court held that due process did not require a pretermination evidentiary hearing prior to the cessation of disability benefits under the Social Security Act, 42 U.S.C. § 423. It must be emphasized, however, that the plaintiff in the present action is not asserting a right to a pre-suspension evidentiary hearing. He merely seeks the opportunity, prior to the suspension of his license, to respond to the three issues which he is entitled to raise at a post-suspension hearing before the Registrar: (1) Was there probable cause for arrest? (2) was there an arrest? (3) Did the person so arrested refuse to submit to a chemical test? See M.G.L. c. 90 § 24(1)(g).[11]

Although the precise issue presented in the instant case is thus different than that in *Eldridge*, the standards set

[11]The parties apparently agree that a licensee may receive an immediate hearing before the Registrar upon turning in his license to the Registrar. He may also be represented by an attorney at such a hearing. If, upon examination of the Report of Refusal to Submit to a Chemical Test, the hearing officer finds it to be incomplete or improperly completed, the license may be immediately returned. If a hearing is held, it must be limited to the three issues stated. A negative finding on any of these issues results in reinstatement of the license. Witnesses may be presented by either the police or licensee in this post-suspension hearing. However, if such questioning is requested by either side, or further investigation is necessary, the hearing may be postponed until such witnesses are available or investigation has been completed. The license remains suspended during such postponement.

A licensee may appeal an adverse decision of the Registrar to the Board of Appeal on Motor Vehicle Liability Policies and Bonds under M.G.L. c. 90, § 28, n. 8, *supra*. This decision is subject to judicial review. M.G.L. c. 30A, § 14.

forth in *Eldridge* are applicable. In *Eldridge*, the court stated that:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g.*, *Goldberg* v. *Kelly*, *supra* at 263-271.

Id. at 334-35.

Applying the three-pronged test to the present case, we conclude that the Massachusetts implied consent statute does not satisfy due process. The first factor to consider under this analysis is the private interest that is affected. In the present action the plaintiff's interest is in possessing a valid driver's license and the attendant right to operate a motor vehicle on a public way in Massachusetts. Little discussion is necessary to establish the importance of mobility in our society. According to the uncontroverted affidavit of the plaintiff, possession of a driver's license is essential to his livelihood. Moreover, an individual who has been erroneously deprived of his license can not be fully compensated for its loss by subsequent corrective administrative action. *Cf. Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In contrast, the Supreme Court in *Eldridge* found that a recipient whose Social Security disability benefits had been wrong-

fully terminated could be completely compensated retroactively. *Cf. Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

In considering the second factor set forth in *Eldridge*, the defendant contends that the risk of erroneous suspension under existing procedures is minimal in view of the statutory requirements concerning the preparation of the Report of Refusal to Submit to a Chemical Test. Under M.G.L. c. 90 § 24(1)(f), the Report must be written on a form approved by the Registrar, sworn to under the penalties of perjury by the officer to whom the refusal was made, endorsed by a third person who witnessed the refusal, and also endorsed by the police chief. The police officer preparing the Report must state the grounds for his belief that the person arrested had been driving a motor vehicle on a public way while under the influence of intoxicating liquor and that such person refused to submit to a chemical test when requested to do so. Despite these precautions, errors, clerical or otherwise, could occur. *Slone* v. *Kentucky Department of Transportation*, *supra*; *cf. Reese* v. *Kassab*, 334 F. Supp. 744 (W.D. Penn. 1971). Since plaintiff is not demanding a full evidentiary hearing, the provision of some kind of additional pre-suspension procedure designed to protect against such errors would be minimal, particularly in comparison to the magnitude of harm which the licensee would suffer as a result of an improper suspension. In contrast perhaps to the allowance of a full pre-suspension evidentiary hearing, the mere provision of an opportunity to respond to the police assertions contained in the Report, prior to suspension, would not impose an onerous burden on the state's administrative procedure.

The Court in *Eldridge* examined the pretermination procedures required by the Social Security Act and the relevant regulations and concluded that they provided

sufficient safeguards so as to preclude the necessity of a pretermination evidentiary hearing. However, the pretermination procedures available in *Eldridge* differ from that involved in the present action in at least one significant respect. In *Eldridge*, the recipient was given full access to the information upon which the administrative decision was to be rendered and given the opportunity to submit additional evidence or arguments "to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative assessment." *Eldridge*, *supra*, at 345-46. The risk of an erroneous termination was thus minimized. *Cf. Arnett* v. *Kennedy*, *supra*. The Massachusetts statute, however, does not afford the licensee, prior to suspension, any opportunity to respond to the contention of the police that he improperly refused to submit to a chemical test.[12]

The third and final factor to consider is the interest the state seeks to protect. It is undisputed that a significant percentage of traffic fatalities are caused by drivers who operate while under the influence of intoxicating liquor. Nevertheless, as the courts in *Holland*, *supra*, and *Chavez*, *supra*, correctly pointed out, the state's summary license suspension statute does not remove the drunk driver from the highway, so long as he submits to a chemical test, but

[12] In *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974), the Supreme Court upheld Louisiana's sequestration statute which allowed a mortgage or lien holder to obtain a writ of sequestration against the debtor without prior notice or hearing. In so doing, the Court stressed certain features of the statutory scheme, including the requirement that the creditor post a bond to protect the debtor from damages and judicial supervision of the ex parte procedure, as well as the weak interest of the debtor in the collateral since he did not have full ownership interest in it. The absence of these features make the present case distinguishable.

only removes the motorist who has refused to submit to a test.

The present defendant, however, asserts that the commonwealth's interest in summary license suspension is not only in immediately removing drinking drivers from the road, but, in view of a chemical test's subsequent evidentiary value, is also in compelling motorists to submit to a breathalyzer or similar type of test. He contends that the use of the chemical test provided for under the statute "eliminate[s] mistakes which may arise from objective observation alone . . ." *Popp* v. *Motor Vehicle Department*, 211 Kan. 763, 508 P. 2d 991, 995 (1973). As such it is extremely helpful in convicting those charged with driving while under the influence of intoxicating liquor. The defendant argues that only the threat of immediate license suspension is sufficient to ensure the motorist's cooperation. We do not question the breathalyzer's evidentiary value and that the state consequently has an interest in encouraging motorists to take the test. We are not, however, persuaded by defendant's argument that the delay caused by a mandatory hearing or opportunity to respond prior to suspension would discourage motorists from taking a chemical test when requested to do so. Rather, we believe that the state's interest can still be advanced even though the licensee is given some opportunity to respond prior to suspension. The state could, for example, establish a maximum time period within which the licen[illegible], upon receiving notice of pending suspension, would be able to respond to any or all of the three issues which may now be contested only in a post-suspension hearing. Decision on the suspension could then be rendered within a pre-established time frame. The licensee would thus be afforded procedural safeguards while the threat of suspension would remain sufficiently certain so as to continue to serve as an

incentive to take the breathalyzer test. It is not, of course, for this court to make legislative decisions determining the most efficacious manner in which due process is to be satisfied. Our suggestion, however, does demonstrate the existence of at least one viable alternative to the present statutory scheme which accommodates both the state's interest and the motorist's constitutional right to due process.

Our dissenting brother believes that the potential harm from an erroneous deprivation is alleviated by the provision of an immediate hearing upon the driver surrendering his license to the Registrar. However, as we have already noted, note 11, *supra*, and our dissenting brother apparently concedes, such a hearing is likely to be delayed. Since the suspension continues during this period, we must conclude that additional safeguards are mandated before suspension can be imposed. While we appreciate and share our brother's concern for ensuring the state's ability to compel drivers to take a chemical test, we do not believe this interest is sacrificed by providing the licensee at least a minimal opportunity to be heard prior to suspension.

The present case should also be distinguished from the decision in *Almeida* v. *Lucey*, 372 F. Supp. 109 (D. Mass.), *aff'd* 419 U.S. 806 (1974). In that case, the court rejected a constitutional challenge to M.G.L. c. 218 § 26 which provided for an automatic one-year suspension of a motorist's license upon his conviction in a jury-waived state district court trial. Thus, in *Almeida*, there was an opportunity for a hearing prior to license suspension. The thrust of the constitutional challenge in *Almeida* was the inadequacy of the hearing provided in the district court since it was subject to a *de novo* trial in Superior Court. The court expressly declined to rule on the plaintiff's challenge to the constitutionality of the Massachusetts two-tier system

of criminal justice. It chose instead to find that at least "[f]or a determination adequate to support revoking a license, a non-jury [state] district court proceeding provides all the necessary elements of due process." 372 F. Supp. at 111. In contrast to *Almeida*, the basis of the constitutional challenge in the present action is the lack of any opportunity to be heard prior to license suspension. The question in the case at bar is not what kind of hearing is required, but whether any pre-suspension opportunity to be heard is required at all. See, Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

CLASS ACTION

Plaintiff seeks to bring this suit as a class action under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiff purports to represent a class consisting of those persons whose Massachusetts license to operate a motor vehicle has been suspended by the defendant or his predecessors or successors in office, prior to an opportunity for a hearing on such suspension. Pursuant to subsection (c)(1) of Rule 23, the court determines and orders that this action is properly maintainable as a class action. The plaintiff may sue as a representative of the class he seeks to represent.

The Court finds that the class is so numerous that joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims of the representative party here are typical of the claims of the class he represents, and that the representative party will fairly and adequately protect the interests of the class. In addition, the court finds that the defendant has acted on grounds generally applicable to the class by automatically

suspending the licenses of class members without a hearing pursuant to M.G.L. c. 90 § 24(1)(f). The court therefore finds the class action to be maintainable under Rule 23(b)(2).

For the reasons stated herein the Massachusetts implied consent statute is declared to be unconstitutional and the defendant Registrar and his successors in office are hereby enjoined from enforcing M.G.L. c. 90 § 24(1)(f).

FRANK H. FREEDMAN,
United States District Judge.

JOSEPH L. TAURO,
United States District Judge.

CAMPBELL, *Circuit Judge* (dissenting).

I agree that the legal standard to apply in determining whether the Massachusetts procedures comply with due process is found in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), a case holding that social security disability benefits may be suspended during the year that it may take to hold and conclude a hearing on the suspension. Referring to earlier due process decisions, the Court said,

> "These decisions underscore the truism that '[due process], unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'. . . Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires

> analysis of the governmental and private interests that are affected."

Id. at 334 [citations omitted]. My disagreement with my brothers stems from my belief that they underestimate the adequacy of the protections presently afforded to a licensee, and are vastly optimistic insofar as they feel that all the Commonwealth is here being asked to do is provide some kind of "minimal" pre-suspension procedure, not a full-dress hearing. In my calculus of the affected governmental and private interests, *see id.*, the Commonwealth deserves to come out on top.

It should be borne in mind that under the challenged state procedures a protesting licensee is entitled to obtain an immediate hearing upon surrender of his license. He need not wait several months. The parties have stipulated, and the court agrees, *see* n. 11, that Massachusetts provides the licensee with the right to an *immediate* hearing before the Registrar of Motor Vehicles, with counsel, the very day that he surrenders his license, the hearing being addressed to the only relevant issues, namely whether there was probable cause to arrest, whether there was an arrest, and whether the person arrested refused to submit to a test. A negative finding on any issue leads to reinstatement of the license. Petitioner did not elect to request such a hearing, preferring to seek a hearing under a slower alternate procedure provided by M.G.L. c. 90, § 28. We are thus talking about a period of suspension that lasts no longer than it takes for the licensee's objections to be fully ventilated. If, as my brothers suggest may sometimes be the case, the errors are merely "clerical", the hearing would be quickly over and the license recovered the same day it was surrendered. If, as seems more likely, the licensee is contesting

some aspect of the police officers' version of what occurred, the hearing may take a little longer, since the officers will have to be brought in to testify. In any event, we are talking about no more than several days — as contrasted with the year or more which the Supreme Court found tolerable, in different circumstances. in *Eldridge*, *see* 424 U.S. at 342.

To be sure, even a brief suspension might be intolerable if based upon inadequate threshold procedures. The probable reliability of such initial procedures is relevant in determining whether the process, overall, is fair. *See id.* at 343. Here the brief pre-hearing suspension rests upon a substantial prima facie showing of violation which, in turn, rests upon facts so simple that the likelihood of police error is small. The relevant facts are whether there was a valid arrest and an improper refusal to take a test. These facts must be reported by the officer in whose presence the test was refused, under penalties of perjury, with an endorsement by a third party who witnessed the refusal as well as by the Chief of Police. That such a report will be reliable in the vast majority of cases seems to me to be a reasonable assumption. The officer assumes personal responsibility for the report; he can be held personally liable, and may be in trouble with his Chief, for any wilful misrepresentation; the facts being reported are few and susceptible of direct observation.

Still, in an imperfect world, one may concede the possibility of occasional mistake,[1] and my brothers argue that in *Eldridge*, it was at least possible to recompense the beneficiary for cancellation of any benefits later found to have been

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[1] The legislature could also take realistic account of the likelihood of *post facto* pressures and excuses of the cock and bull variety upon both police and registry personnel.

due. There is, they say, no way to make someone whole for mistaken deprivation of a license. I suppose the latter has to be conceded. However, by the same token, a totally disabled indigent is unlikely to be made whole in any true sense for the suffering undergone during the full year that social security benefits were wrongfully withdrawn. Losing a license for, at most, a few days is surely not to be compared in seriousness with the extended withdrawal of benefits sanctioned in *Eldridge*.

But of course it is not enough merely to point out that the chance of error is small and that the deprivation, in case of error, is less than catastrophic. These facts are important, but under *Eldridge* it must also be asked whether the state's interests justify imposing even this rather minimal burden in the rather unlikely event of a mistake. My brethren think not. They say that "since the plaintiff is not demanding a full evidentiary hearing, the provision of some kind of additional pre-suspension procedure designed to protect against such errors would be minimal. . . ." They suggest that all that is wanting is "the mere provision of an opportunity to respond to the police assertions contained in the Report." If that is all, this case is surely a waste of effort. Even the present law does not prevent the writing of a "mere" response to police assertions. Of course, such a gratuitous response is unlikely to do any good. Presumably what the court really means is that there should not only be an opportunity to respond but a duty upon the Registrar to consider and act upon the response, which means providing administrative machinery either to resolve the controversy on the spot or to defer suspension of the license until after a hearing. I suggest that such procedures, to be meaningful, will impose substantial new administrative burdens, will lessen the effect of the sanction, and will in most instances require an evidentiary hearing. To be sure, a very routine

preliminary screening might painlessly catch an occasional "clerical" error, but it is not forthright to pretend that clerical errors are what this case is all about. Such an error, if not resolved informally by a phone call to the police, can be quickly corrected at the hearing which the licensee immediately receives when he surrenders his license. The more likely claim of error will not be "clerical": it will involve, like the present case, a claim which the Registrar can only determine after a hearing attended by both sides. Issues of fact and credibility will most likely be present. What good, then, will "the mere provision of an opportunity to respond" have done? Arguably the Registrar can make a judgment, if the licensee's story sounds compelling, to put off suspension until after a hearing. But if he is granted this kind of discretion[1] I suggest that many persons refusing to take a test will now be encouraged to fight suspension by protest and written argument. The number of protests and probably of hearings will increase since there will be a clear tactical advantage to filing an objection. At the very least, the objection may serve to delay the suspension. The ultimate effect will be to lessen the reality of the threat of immediate suspension and to impose new burdens and costs on the Registrar.

I think that Massachusetts legislators could rationally have determined that only by delaying adjudicative procedures until *after* surrender of the license could they assure an expeditious carrying out of the sanction adopted to force people to submit to the chemical or breath test. The more discretion is given to the Registrar to postpone the evil day when the license is surrendered, the more likely it is that some drivers will be able to discover "angles" to evade the

[1] Of course, if the Registrar were granted no discretion, a pre-suspension proceeding would be pointless.

consequences of their refusal to submit to the test and the more pressures will be generated upon officials to back down. The Attorney General advises us that the cases where drivers decline to submit to the test number in the thousands. We are dealing with a matter where a balance must be struck between the requirements of realistic enforcement and the affording of ideal procedures. Judges and lawyers all too readily see the world as an endless extension of courtrooms and hearings. There is also the right of the public to highway regulations that are sufficiently potent to accomplish their goals.

In my view, given the seriousness of the problem which this statute seeks to attack, drunken driving, and the desirability of arming the police and the Registrar with workable weapons to require submission to chemical and breath tests, the procedures here challenged are not unreasonable. The maximum harm to the occasional citizen who is mistakenly embroiled — a very brief suspension of his license[3] — is justified by the practical need for summary procedures that can be applied on a statewide basis to thousands of motorists. Even the fairest of procedures cannot avoid the possibility of occasional error. Society could not exist if the Constitution required nothing but error-free laws. Innocent men are occasionally put to the expense and fright of a criminal trial; license renewals get lost in the mail; credit cards get charged to the wrong account. Due process does not require society to stop functioning until the millenium.

This, moreover, is the sort of legislation which is likely to be corrected by the legislature itself if too harsh in practice.

[3] If a hearing on the suspension were not available for a protracted period of time, I would feel quite differently. Here the citizen is merely losing his license during the hearing period on the basis of a sworn police report. The limited summary power seems to me no different than the summary power to tow an illegally parked vehicle.

Most voters are drivers, and will complain in no uncertain terms if procedures perceived to be oppressive are applied to themselves, their children and their neighbors. Traffic regulations involve a tension between our desire for maximum freedom and our desire for maximum protection from "the other fellow." More people die yearly in traffic fatalities than in most wars. Alcohol is said to be the outstanding killer. I think that the legislature is ordinarily a better forum than the federal court for deciding just how the balance should be struck between toughness and tenderness in this area. The danger of real oppression seems modest.

I would dismiss the petition.

LEVIN H. CAMPBELL,
Circuit Judge.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DONALD E. MONTRYM, individually and in behalf of all others similarly situated, Plaintiff	)	CIVIL ACTION No. 76-2560-F
v.		
ROBERT A. PANORA, Registrar of Motor Vehicles, and his successors in office, Defendants	)	

Final Judgment

This cause came on to be heard on plaintiff's motion for summary judgment and motion to certify the class; and the court having heard oral arguments and having considered the parties agreed statement of facts and documents; and it appearing that the M.G.L. Ch. 90 § 24(1)(f) is unconstitutional on its face in accordance with the opinion of this court filed on March 25, 1977 which is incorporated herein, and more specifically in that it violates the due process clause of the Fourteenth Amendment because it fails to provide a licensee an opportunity to respond prior to having his license revoked under the statute; and further that the defendant's continuing enforcement of M.G.L. Ch. 90 § 24(1)(f) is and will cause irreparable injury to the plain-

tiffs by the loss of their driver's licenses and in accordance with said opinion; therefore:

IT IS HEREBY ORDERED, ADJUDGED, DECREED: that

1. The class in this action is certified as follows:

> All of those persons whose Massachusetts license to operate a motor vehicle has been, or is about to be suspended by the Registrar of Motor Vehicles or his predecessors or successors in office pursuant to Mass. General Laws Ch. 90 § 24(1)(f);

2. Since M.G.L. Ch. § 24(1)(f) fails to provide a licensee with an opportunity to respond prior to suspension of his license in violation of the due process clause, it is declared unconstitutional on its face, and Robert A. Panora, Registrar of Motor Vehicles, his successors in office, his officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with them, be and they hereby are permanently enjoined and restrained from revoking the driver's licenses of plaintiffs pursuant to M.G.L. Ch. 90 § 24(1)(f); and further the Registrar, his successors in office, his officers, agents, representative, employees, attorneys, and all persons in active concert and participation with them are ordered and directed to return by May 11, 1977 the driver's licenses of

the plaintiffs which are now in their possession and which were previously revoked pursuant to M.G.L. Ch. 90 § 24(1)(f).

Issued at Boston
on May 4, 1977

FRANK H. FREEDMAN,
United States Judge.
JOSEPH L. TAURO,
United States Judge.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DONALD E. MONTRYM, et al. Plaintiff	)	CIVIL ACTION No. 76-2560-F
v.	)	
ROBERT A. PANORA, Registrar of Motor Vehicles, and his Successors in Office, Defendant	)	

Notice of Appeal

Notice is hereby given that Registrar of Motor Vehicles for the Commonwealth of Massachusetts, the defendant in the above entitled action, hereby appeals to the United States Supreme Court from the final judgment granting plaintiff's motion for summary judgment on the issue of the constitutionality of Mass. Gen. Laws c. 90, § 24(1)(f). Said judgment was entered on May 4, 1977, in the United States District Court for the District of Massachusetts. Appeal is taken to the United States Supreme Court pursuant to 28 U.S.C. § 1253.

By his Attorney,
STEVEN A. RUSCONI,
Assistant Attorney General.

Filed May 13, 1977.

Appendix.

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

v.

DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Docketed July 12, 1977.
Probable Jurisdiction Noted April 17, 1978.

Table of Contents.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

DONALD E. MONTRYM, INDIVIDUALLY AND IN BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff
v.
ROBERT A. PANORA, REGISTRAR OF MOTOR VEHICLES, AND HIS SUCCESSORS IN OFFICE,
Defendant

CIVIL ACTION No. 76-2560-F

Docket Entries.

1976

July

2 Complaint filed (request for three-judge court)
Motion for temporary restraining order filed.
Memorandum in support of plaintiff's motion for TRO filed.
Motion for appointment of special process server filed.

7 *FREEDMAN, J.* Re motion for appointment of special process server-"ALLOWED".
Summons issued.
FREEDMAN, J. ORDER ENTERED . . . it may be that the result in this case so clearly obtains as to obviate the requirement for a three-judge court. The parties are invited to submit memoranda on this issue within 21 days of the date of this order. cc/cl.

1976

July

9 Motion for temporary restraining order FILED (ASSENTED TO).
FREEDMAN, J. 2:30 P.M. RESTRAINING ORDER ENTERED . . . are enjoined from revoking Donald E. Montrym's driver's license . . . cc/cl.

12 Letter dated July 9, 1976 from plaintiff's counsel re three-judge court.

November

17 *FREEDMAN, J.* ORDER ENTERED . . . a three-judge court having been convened, it is ordered that a hearing on the merits be held before the U.S. District Court on Wednesday, December 15, 1976 at 2 PM . . . it is further ordered that the parties herein file a stipulation of undisputed facts and relevant documents on or before Dec. 1, 1976 and the parties herein submit their memoranda of law no later than Dec. 8, 1976. Counsel are directed to file all papers in quadruplicate cc/cl.

23 P's motion to certify class FILED CS

December

3 Appearance of Steven A. Rusconi as counsel for defendant FILED
D's motion for continuance of hearing on merits FILED cs

6 Letter from plaintiff's counsel stating no objection to request for continuance.
Defendant's motion to file answer late FILED CS

1976

December

6 Deft's Answer filed. c/s

1977

January

5 Memorandum of law in support of judgment for defendant FILED cs

11 Plaintiff's motion for a preliminary injunction FILED
Plaintiff's motion for partial summary judgment with attached affidavit FILED
Agreed statement of facts with attached exhibits FILED

12 Plaintiff's brief in support of his motion for a preliminary injunction and partial summary judgment FILED CS
FREEDMAN, J. Hearing on the merits for partial summary judgment and preliminary injunction; arguments; TAKEN UNDER ADVISEMENT.

14 Corrected copies of plaintiff's brief in support of his motion for a preliminary injunction and partial summary judgment FILED cs

March

25 *FREEDMAN, J., TAURO, J.* OPINION ENTERED. cc/cl., West, Mass Lawyers
CAMPBELL, J., DISSENTING OPINION ENTERED, cc/cl., West, Mass Lawyers

1977

April

4 *FREEDMAN, J., TAURO, J.* JUDGMENT ENTERED . . . this matter came on for hearing for summary judgment on the issue of the constitutionality of MGL C90 § 24(1)(f). The case having been duly argued by counsel and a decision having been rendered in an opinion filed March 25, it is hereby ordered, adjudged and decreed that the plaintiff's motion be granted. cc/cl

8 Deft's motion for entry of judgment filed CS
Memorandum of law in support of deft's motion for entry of judgment FILED CS

12 *FREEDMAN, J., TAURO, J.* Clarification of 4/4/77 judgment, filed, copies to counsel.
Deft's Notice of Appeal to the Supreme Court filed. c/s

14 Ltr from Mr. Hagopian to Clerk requesting judgment be entered, filed.

18 P's motion for Contempt Order filed.

20 Certified copy of docket entries and pleadings forwarded to the United States Supreme Court.

October

6 *TAURO, D.J.* MEMORANDUM ENTERED (signed by Freedman, J., Tauro, J.)
CAMPBELL, C.J. Dissenting memorandum entered. West, Mass Lawyers, cc/cl.
FREEDMAN, J., TAURO, J. ORDER ENTERED . . . in accordance with the

1977

October

6 memorandum issued today, the court ORDERS that the defendant's motion for reconsideration of its previous motions to stay judgment and to modify judgment is denied. The court further orders that the judgment in favor of the plaintiff entered on May 4, 1977 remain in effect. cc/cl. West, Mass Lawyers

November

7 Letter dated Nov. 3, 1977 from Plaintiff's counsel to Clerk explaining mailing of memorandum dated October 6, 1977 to Supreme Court.

December

8 Original pleadings returned from the Supreme Court.

1978

April

21 ORDER DATED APRIL 17, 1978 from Clerk, Supreme Court of the United States: "Appeal from the United States District Court for the District of Massachusetts The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted."

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[Title omitted in Printing.]

Complaint.

CAUSE OF ACTION AND JURISDICTION

1. This action arises under 42 USC 1983 and jurisdiction is predicated under 28 USC 1343(3).

PARTIES

2A. Plaintiff, Donald E. Montrym, is a resident of Acton, Massachusetts, and a citizen of the United States.

2B. Plaintiff Montrym brings this action on behalf of all persons similarly situated pursuant to Rule 23(a) and (b)(2). The class action allegations are set out more fully in paragraphs 16-22 infra.

3. The defendant is Robert A. Panora, Registrar of Motor Vehicles of the Commonwealth of Massachusetts, and his successors in office.

THREE JUDGE COURT

4. Plaintiff requests a three-judge court be convened pursuant to 28 USC 2281-2284.

FACTS

5. On May 15, 1976, the plaintiff was involved in an automobile accident in Acton. Shortly thereafter, at 8:30 p.m., an Acton police officer arrived at the scene of the accident. He arrested the plaintiff and charged him with driving under the influence of intoxicating liquors, an offense set out under G.L. Ch. 90 § 24(1)(a).

6. The plaintiff was brought to the Acton police station and asked whether he wanted to submit to a breathalyzer test. He was not advised that his driver's license would be suspended for ninety days if he refused to take the test. He refused.

7. At 9:05 p.m., the plaintiff's attorney, Richard B. Harris, Esq., arrived at the Acton police station, and upon his advice, the plaintiff requested the police to administer the breathalyzer test. The Acton police refused to give plaintiff the breathalyzer test. The plaintiff and his attorney repeated the request again and it was denied.

8. On June 8, 1976, the plaintiff was charged in District Court of Central Middlesex with driving under the influence of intoxicating liquors, an offense under G.L. Ch. 90 24(1)(a), and after a trial the complaint was dismissed. In addition, the district court entered a specific finding: "Breathalyzer refused when requested within 1/2 hour arrival at [the police] station". A certified copy of the record of the district court preceedings marked exhibit A is attached and incorporated herein.

9. Anticipating some action, plaintiff's attorney, Richard B. Harris, Esq., wrote the defendant Registrar on June 2, 1976 and informed him that the criminal complaint against the plaintiff was dismissed by the District Court of Central Middlesex, and enclosed an affidavit by the plaintiff verifying his request of the Acton police to take the breathalyzer

test. Plaintiff's attorney requested a stay of any action by the Registrar.

10. On June 10, 1976, the plaintiff's driver's license was suspended by the defendant for a period of ninety days for refusing to submit to a chemical test, i.e., the breathalyzer, pursuant to G.L. Ch. 90 § 24(1)(f) which reads:

> (*f*) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be made on a form approved by the registrar, and shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's

> belief that the person arrested had been driving a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief, as defined in section one of chapter ninety C, or by the person authorized by him and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person under this chapter or the right of such person to operate motor vehicles in the commonwealth under section ten for a period of ninety days. [Amended by St.1972, c. 488, § 2.]

A copy of the defendant's suspension notice marked exhibit B is attached and incorporated herein.

11. The plaintiff mailed his driver's license #052223814 to the Registrar who in turn received it on June 8, 1976.

12. On June 11, 1976, the defendant replied to plaintiff's attorney:

> In reference to your letter of June 2, 1976 concerning the above-named [Donald E. Montrym], this is to advise you that his license has already been suspended and said license must be returned to this office immediately.
>
> Very truly yours,
>
> [s] Robert A. Panora
> Registrar

13. On June 25, 1976, the plaintiff by his attorney, Robert W. Hagopian, made demand for the return of his license. A copy of this demand marked exhibit C is attached and incorporated herein. The Registrar has refused to return plaintiff's license.

14. The plaintiff depends upon his license for his livelihood. An affidavit in support thereof marked exhibit D in support thereof is attached and incorporated herein.

15. The plaintiff maintains that G.L. Ch. 90 § 24(1)(f) is unconstitutional on its face and as applied in that it deprives him of his driver's license, a valuable property right, without due process in that plaintiff was denied a presuspension hearing. See *Bell* v. *Burson*, 402 U.S. 535, 542; *Cicchetti* v. *Lucey*, 376 F. Supp. 215 (D. Mass. 1974), reversed on other grounds 514 F 2d 362 (1974); *Pollard* v. *Panora*, ____ F. Supp. ____; *Warner* v. *Womberta*, 348 F. Supp. 1068, aff'd 410 U.S. 919 and in particular *Holland* v. *Parker*, 354 F. Supp. 196 (three-judge court DSD 1973).

Class Action

16. This action is brought pursuant to Rule 23(a) and (b)(2) of Federal Rules of Civil Procedure.

17. Plaintiffs constitute the class of those persons whose Massachusetts license to operate motor vehicles has been suspended by the defendant or his predecessors or successors in office pursuant to Massachusetts General Laws, Chapter 90 § 24(1)(f) prior to an opportunity for hearing on such suspension.

18. The members of the class are so numerous as to make joinder impractical. To join all members of the class would be extremely difficult and inconvenient.

19. The question of law common to the class is the constitutionality of G.L. Ch. 90 § 24(f).

20. The claim of the plaintiff Montrym is identical to the claim of the class, i.e., suspension of a driver's license without a hearing pursuant to G.L. Ch. 90 § 24(1)(f).

21. The interest of plaintiff Montrym's claim does not conflict with the claims of the members of the class. Plaintiff's attorney's practice compromises a substantial amount of litigation in the area of constitutional rights.

22. The defendant's conduct in suspending licenses without a hearing pursuant to G.L. Ch. 90 § 24(1)(f) is uniform to the class and final injunctive and/or declaratory relief as requested infra is appropriate with respect to the class as a whole.

Relief

23. Declare G.L. Ch. 90 § 24(1)(f) unconstitutional on its face or as applied to plaintiff.

24. Plaintiff Montrym prays this court for a temporary order restraining the suspension of his driver's license. A copy of a proposed restraining order is attached. (Plaintiff's attorney notified defendant's attorney, Robert Kelley, Esq., that he would seek this action, including the time and place).

25. Plaintiff prays this court for a preliminary and permanent injunction barring the defendant from enforcing G.L. Ch. 90 § 24(1)(f) and barring the defendant from suspending plaintiff's license.

26. Plaintiff Montrym prays that damages be awarded him in the amount of two hundred and fifty ($250) dollars per day for each day that his driver's license has been suspended.

27. Plaintiff Montrym prays that punitive damages in the amount of $5,000 be awarded.

28. Plaintiff Montrym prays that reasonable attorney's fees be awarded.

29. Plaintiff prays such further relief as this court deems just and proper.

By his attorney,
ROBERT W. HAGOPIAN.
Co-Counsel
RICHARD BATES HARRIS.

EXHIBIT A.

COMMONWEALTH OF MASSACHUSETTS.

DISTRICT COURT OF CENTRAL MIDDLESEX.

COMMONWEALTH,

vs.

DONALD E. MONTRYM

VIOLATION OF MOTOR VEHICLE LAW

OPERATING MV.V UNDER INF. INTOX. LIQ. General Laws, Chapter 90, Section 24.

Penalty: Fine not less than $35. nor more than $1,000., or imprisonment not less than 2 weeks nor more than 2 yrs., or both such fine & imprisonment.

ARREST 5-17-76

DEFT. NOTIFIED OF RIGHT TO HAVE COUNSEL _____ J.

Atty. Bates filed app — plea NG C. 6-2-76

5-28-76 Motion to Suppress & affidavit filed FORTE, J.

Dismissed. Breathalyzer refused when requested within ½ hr of arrest at station. See affidavit & memorandum.
GELINAS, J.

To the District Court of Central Middlesex,
in the County of Middlesex.

George W. Robinson of Acton in said County, in behalf of the Commonwealth of Massachusetts, on oath, complains that Donald E. Montrym of Acton on 5-15-76 at Acton aforesaid upon a way or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licenses, did operate a motor vehicle while under the influence of intoxicating liquor against the peace of said Commonwealth and contrary to the form of the Statute in such case made and provided.

GEORGE W. ROBINSON,
Complainant.

Received and sworn to 5-17-76 before said Court.

EDWARD F. SULESKY,
Assistant Clerk of said Court.

At the District Court of Central Middlesex, holden at Concord, within the County of Middlesex, for the transaction of Criminal Business.

George W. Robinson of Acton in the County of Middlesex, complainant and Donald E. Montrym of Acton in the County of Middlesex, defendant.

Complaint for operating a motor vehicle under the influence, G.L. ch 90:24.

I hereby certify that the above entitled complaint was duly entered in said Court on the 17th day of May A.D. 1976.

That on the 17th day of May A.D. 1976, the said defendant is arraigned in said Court upon said complaint, that he is asked by the Court whether he is guilty or not guilty of the allegations contained in said complaint, and the said defendant pleads and says that he is not guilty, and the hearing thereon is then and there continued from time to time to the second day of June A.D. 1976, on which day trial is had and the Court thereupon dismissed the complaint.

IN TESTIMONY that the foregoing is a true copy of record in the case of the Commonwealth vs. DONALD E. MONTRYM from the records of said Court, together with an attested copy of the complaint, I hereunto subscribe my name and affix the seal of said Court, at Concord aforesaid, this 25th day of June A.D. 1976.

Attest: _____
Clerk of said Court.

ADDRESS ANY INQUIRY TO SUSPENSION SECTION AND GIVE FILE NUMBER. YOUR CASE WILL NOT BE REVIEWED UNTIL YOUR SUSPENDED OR REVOKED LICENSE IS RECEIVED AT THE REGISTRY OFFICE

NOTICE OF ACTION BY THE REGISTRAR

THE COMMONWEALTH OF MASSACHUSETTS
REGISTRY OF MOTOR VEHICLES
100 NASHUA STREET BOSTON MASS 02114

Burrough.

ADDRESSEE	DATE OF BIRTH	DATE OF SUSPENSION OR REVOCATION
MONTRYM, DONALD E 417 ARLINGTON ST ACTON MA 01720	04-10-30 2	06-07-76

YOU ARE HEREBY NOTIFIED THAT IN ACCORDANCE WITH STATUTORY AUTHORITY I HAVE THIS DAY

SUSPENDED YOUR LICENSE TO OPERATE MOTOR VEHICLES

FOR THE REASON SHOWN IN CODE BELOW
RETURN ONLY ITEM(S) NOTED ABOVE

THIS ACTION IS EFFECTIVE AS OF THE HOUR IT WAS ISSUED AND YOU MUST COMPLY WITH IT IMMEDIATELY YOU ARE SUBJECT TO ARREST IF YOU FAIL TO DO SO

[redacted]
Robert A. Fleming
REGISTRAR OF MOTOR VEHICLES

FOLD

REASON (CODED) OVER	LIC. PERMIT OR REG. NUMBER	PERIOD OF TIME	FILE NUMBER	LOCATION AND DATE OF OFFENSE	MO	DAY	YR
2J	052223914	90 DAYS	CL07017	ACTON	05	15	76

IMPORTANT

When your LICENSE to operate motor vehicles has been suspended or revoked you must CEASE OPERATING and DELIVER TO ME AT ONCE said license and/or permit. You must not again operate a motor vehicle until your license has been reinstated.

When your RIGHT TO OPERATE has been suspended you MUST NOT OPERATE and you cannot apply for a learner's permit or a license until your right to operate has been reinstated. If you already hold a Massachusetts license and or permit you MUST SURRENDER IT AT ONCE. If you are a non resident you cannot operate on your out of state license until your right to operate has been reinstated.

A suspended license and/or permit may be either mailed in the enclosed envelope or surrendered at any Registry Office. Bring this notice.

When the REGISTRATION OF YOUR MOTOR VEHICLE or the right to have it operated has been suspended or revoked operation of such vehicle must cease at once and if the vehicle is registered in Massachusetts the registration certificate and number plates must be DELIVERED TO ME IMMEDIATELY.

CH 90 28 RIGHT OF APPEAL — ANY PERSON AGGRIEVED BY A RULING OR DECISION OF THE REGISTRAR MAY WITHIN TEN DAYS THEREAFTER APPEAL FROM SUCH RULING OR DECISION TO THE BOARD OF APPEAL ON MOTOR VEHICLE LIABILITY POLICIES AND BONDS

Form R-53 (CSM REV. - 74 092030

EXHIBIT B.

16

EXPLANATION OF CODES • INDICATES ACTION MANDATORY

- • 1A You were convicted of operating a motor vehicle while under the influence of intoxicating liquor.
- • 1B You were convicted of not stopping and making known your name, residence and register number of the motor vehicle you were operating after knowingly colliding with or otherwise causing injury to a person.
- • 1C You were convicted of going away without stopping and making known your name, residence, and the register number of the motor vehicle you were operating after knowingly colliding with or otherwise causing injury to property.
- • 1D You were convicted of operating a motor vehicle negligently so that the lives or safety of the public might be endangered.
- • 1E You were convicted of operating a motor vehicle recklessly.
- • 1F You were convicted of operating a motor vehicle upon a bet or wager.
- • 1G You were convicted of operating a motor vehicle in a race.
- • 1H You were convicted of using a motor vehicle without authority.
- • 1H.1 You were convicted of operating a motor vehicle without authority after suspension or revocation of your license.
- • 1J You were convicted of having your operator's license or learner's permit to be used by another person.
- • 1K You were convicted of falsely impersonating a person named in an application for an operator's license.
- • 1L You were convicted of making a false statement in an application for an operator's license or learner's permit.
- • 1M You were convicted of making a false statement in an application for registration of a motor vehicle or trailer.
- • 1N You were convicted of procuring false impersonation in an application for a license to operate motor vehicle or a learner's permit.
- • 1P You were convicted three times of speeding and/or other offenses of chapter 90, sections 16, 17, 18, within a calendar year.
- • 1Q After an investigation of a fatal accident in which a motor vehicle operated by you was involved and a hearing, I am unable to determine that the accident occured without serious fault on your part.
- • 1R You were convicted of stealing a motor vehicle or trailer or any illegal acts in connection with Ch. 266, Sec. 28.
- • 1T You were convicted of operating under the influence of a narcotic or other drug or vapor noted in chapter 90, section 24.
- • 1X You were convicted of violation of Section 24B of Chapter 90.
- • 2A Pending an investigation, it appears that a motor vehicle operated by you was involved in an accident that resulted in a death.
- • 2B You failed to satisfy a property damage judgment.
- • 2D You defaulted a court summons.
- • 2E Failure to pay a motor vehicle Excise tax.
- • 2G You were issued three warning citations in one year.
- • 2J You refused to submit to a chemical test.
- • 2K You have been designated an habitual traffic offender.
- 2P You tendered a bad check.
- 3A You committed a violation of the motor vehicle laws of a nature which gives me reason to believe that your continued operation would be so seriously improper as to constitute an immediate threat to the public safety. You are entitled to a hearing within 30 days.
- 3B I have reason to believe that you are an incompetent person to operate motor vehicles (lack of ability, legal qualification or fitness to operate or register a motor vehicle).
- 3C I have reason to believe that you did improperly operate a motor vehicle.
- 3D You, a minor, were convicted or adjudged delinquent of transporting an alcoholic beverage.
- 3D 1 You, a minor were transporting an alcoholic beverage.
- 3D 2 You were adjudged a delinquent child (chapter 119, section 58 A).
- 3E Result of a hearing on a violation of the motor vehicle or related laws.
- 3G You failed to file a report of an accident as required by law.
- 3H I have determined that your motor vehicle or trailer is improperly equipped or otherwise unfit to be operated.
- 3J You did allow your motor vehicle to be operated in violation of the laws and regulations pertaining to motor vehicles.
- 3K You were convicted of disposing of garbage in violation of statute.
- 3L You were convicted of abandoning a motor vehicle.
- 3M You were convicted of a fraudulent claim.
- 3N You were convicted of not displaying flares.
- 3P You failed to notify the registrar of a change of name, or address, or mail address within 30 days.
- • 4D You have failed to file security in accordance with the provisions of general laws, chapter 90, section 30.

17

EXHIBIT C.

June 25, 1976

Mr. Robert A. Panora
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts

Dear Sir:

Please be advised that I represent Mr. Donald Montrym, 417 Arlington Street, Acton, Massachusetts; date of birth April 10, 1930; Massachusetts license no. 052223814. On June 7, 1976, you suspended Mr. Montrym's license for ninety days for refusal to submit to a breathalyzer test out of an incident occurring on May 15, 1976 and in accordance with G.L. Ch. 90 § 24(1)(f). See your file no. DL 07017.

Please be advised that Mr. Montrym did not refuse to submit to a breathalyzer test on May 15, 1976 and that he was acquitted of driving under the influence of intoxicating liquors, G.L. Ch. 90 § (1)(a), on June 2, 1976, complaint no. 4703 in the District Court of Central Middlesex. In addition, the district court made a specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one. This finding is binding upon you. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

Mr. Montrym depends upon his driver's license for his livelihood. Notwithstanding G.L. Ch. 90 § 24(1)(g), your action in suspending his license without affording him a prior hearing is a patent deprivation of his liberty and property without due process and is in contravention of the

Fourteenth Amendment of the United States Constitution. See *Cicchetti* v. *Lucey*, 337 F. Supp. 215 (1974); and *Pollard* v. *Panora*, ____ F. Supp. ____ (D. Mass. 1976).

Demand is hereby made upon you to immediately reinstate Mr. Montrym's driver's license. If you do not take this action and notify me accordingly by 9:30 a.m., Wednesday, June 30, 1976, I will appear in the federal district court for the district of Massachusetts and request that a restraining order be issued against you from continuing to suspend Mr. Montyrm's license. I am also going to request the court to award actual and punitive damages.

Very truly yours,

ROBERT W. HAGOPIAN

RWH:hfc

cc: Richard Harris, Esq., Co-Counsel
Robert Kelly, Esq.
James Manning

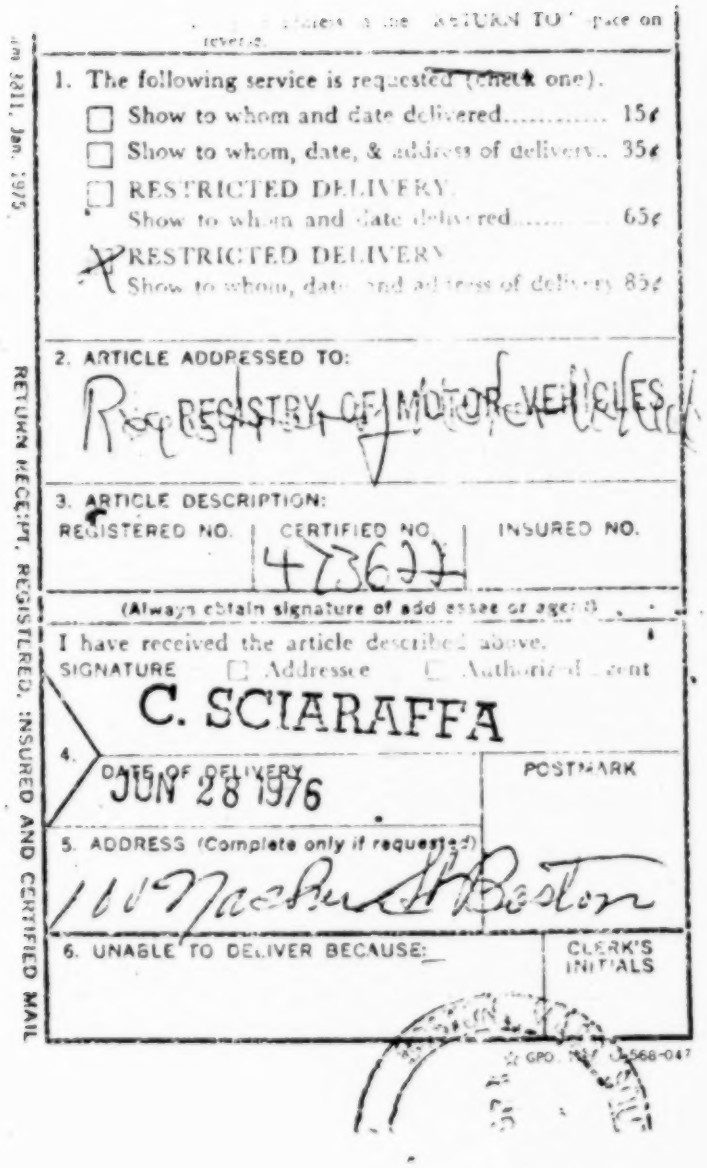

EXHIBIT D.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

Affidavit

I, Donald E. Montrym, on oath do depose and say that:

1. I reside at 417 Arlington Street, Acton, Middlesex County, with my two minor sons of whom I am the sole surviving parent and the sole source of support.

2. I was born April 10, 1930 at Schenectady, New York.

3. The motor vehicle operator's license issued to me by the Commonwealth of Massachusetts is numbered 052-22-3814.

4. I am employed as Purchasing Manager, Capital Equipment, Digital Equipment Corporation, Acton, Massachusetts.

5. Said employment requires me frequently to travel all over the United States using aircraft, trains, buses and automobiles, the latter being my own vehicle and vehicles leased from commercial agencies.

6. I use my own vehicle to commute to work, to shop for necessaries for myself and my two sons, and to transport Boy Scouts and other young people on various excursions as the need arises.

7. The suspension of my license requires me to rely on other persons for transport, to forgo various duties of employment, and to forgo personal uses of transport, all to my harm.

DONALD E. MONTRYM

[Jurat omitted in printing.]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Order.

July 7, 1976

FREEDMAN, D.J.

In view of the decisions of the Supreme Court, *Bell* v. *Burson*, 402 U.S. 535 (1971), and of the lower federal courts, *Pollard* v. *Panora*, C.A. No. 75-2647-T (D. Mass. Mar. 25, 1976); *Cicchetti* v. *Lucey*, 377 F. Supp. 215 (D. Mass. 1974), *vacated on other grounds*, 514 F.2d 362 (1st Cir. 1975), it may be that the result in this case so clearly obtains as to obviate the requirement for a three-judge court. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). The parties are invited to submit memoranda on this issue within 21 days of the date of this order.

FRANK H. FREEDMAN,
United States District Judge.

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Restraining Order.

This cause came on to be heard upon plaintiff's motion consented to by the defendant, and upon the verified complaint of plaintiff, Donald E. Montrym, and it appearing to the court that the defendant's action in continuing to suspend plaintiff's driver's license #052223814 will cause irreparable injury and loss of livelihood, therefore:

IT IS ORDERED, adjudged, and decreed that the defendant Panora, his agents, servants, employees, attorneys, and all persons in active concert and participation with him, are enjoined from revoking Donald E. Montrym's driver's license #052223814 on account of his alleged failure to take a breathalyzer test in accordance with G.L. Ch. 90 § 24(1)(f) on May 15, 1976; and it is further:

ORDERED, that this order shall remain in effect until such further order by the court.

Issued at 2:30 PM July 9, 1976.

FRANK H. FREEDMAN,
United States District Court Judge.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Order.

November 17, 1976

FREEDMAN, D.J.

A three-judge court in the above-entitled case having been convened pursuant to 28 U.S.C. § 2284, it is ordered that a hearing on the merits be held before the United States District Court, on Wednesday, December 15, 1976, at 2:00 p.m., in Courtroom 3, 12th Floor, John W. McCormack Post Office & Courthouse Building, Boston, Massachusetts.

It is further ordered that: (1) the parties herein file a stipulation of undisputed facts and relevant documents on or before December 1, 1976; and (2) the parties herein submit their memoranda of law no later than December 8, 1976. Counsel are directed to file all papers in quadruplicate.

FRANK H. FREEDMAN,
United States District Judge.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Answer.

The defendant in the above-entitled action hereby answers the various allegations of the complaint as follows:

1. The allegations contained in Paragraph 1 are statements of the nature of the action and therefore require no answer.

2A. The allegations contained in Paragraph 2A are admitted.

2B. The allegations contained in Paragraph 2B to the extent that they are a statement of the nature of the case require no answer and to the extent that they state that the requirement of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure have been met are denied.

3. The allegations contained in Paragraph 3 are admitted.

4. The allegations contained in Paragraph 4 are statements of the nature of the case and therefore require no answer.

5. The allegations contained in Paragraph 5 are admitted.

6. The allegations contained in Paragraph 6 to the effect that the plaintiff was brought to the Acton police station and asked whether he wanted to submit to a breathalyzer test and that the plaintiff refused are admitted. The remaining allegations contained in Paragraph 6 are denied.

7. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7.

8. The allegations contained in Paragraph 8 to the effect that the complaint charging the plaintiff with an offense

under G.L. c. 90, § 24(1)(a) was dismissed in the District Court of Central Middlesex are admitted. The defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 8.

9. The defendant admits the allegations contained in the first sentence of Paragraph 9. The defendant denies the allegations contained in the last sentence of Paragraph 9 and by way of further answer states that the plaintiff's attorney requested an indefinite stay of any action by the Registrar on the plaintiff's license.

10. To the extent that the allegations contained in Paragraph 11 are conclusions of law, they require no answer. The allegations in Paragraph 10 to the effect that Exhibit B is a copy of the defendant's suspension notice are denied and by way of further answer states that Exhibit B is not a complete copy of the suspension notice sent by defendant. The remaining allegations contained in Paragraph 10 are admitted.

11. The allegations contained in Paragraphs 11 and 12 are admitted.

12. The allegations contained in the first two sentences of Paragraph 13 are admitted. By way of answer to the allegations contained in the last sentence of Paragraph 13 the defendant states that the plaintiff's license has been returned pursuant to an order entered by this court on July 9, 1976.

13. The defendant is without knowledge to form an opinion as to the truth of the allegations contained in Paragraph 14.

14. The allegations contained in Paragraph 15 are conclusions of law and therefore require no answer.

15. The allegations contained in Paragraph 16 are a statement of the nature of the action and therefore require no answer.

16. The allegations contained in Paragraphs 17 through 22 are conclusions of law which require no answer. If called upon to respond, the defendant would deny the same.

First Defense

On May 15, 1976, at approximately 8:45 p.m., an Acton Police Officer offered to the plaintiff a chemical test or analysis of his breath and at the same time informed the plaintiff that his license to operate a motor vehicle in the Commonwealth would be suspended for a period of ninety days for refusing to submit to said test.

Second Defense

Massachusetts General Law Chapter 90, § 24(1)(f) is constitutional on its face and as applied to the plaintiff meets the constitutional requirement of due process.

By his Attorney,
STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: December 6, 1976.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Agreed Statement of Facts and Documents.

Reserving all rights to introduce additional evidence if necessary, and to object to the introduction of any of the within evidence on grounds of relevancy or materiality, the parties hereby agree that the following facts are true:

1. On May 15, 1976, at approximately 8:15 p.m., Donald E. Montrym, was driving his station wagon upon a public way in the town of Acton. At this time Donald Montrym's vehicle was involved in a collision with a motorcycle. Shortly thereafter, at approximately 8:30 p.m., an Acton police officer arrested Donald Montrym and charged him with violation of Mass. G.L. Ch. 90 § 24(1)(a), operating under the influence of intoxicating liquor, driving to endanger, and no registration in possession. The police officer issued a citation, pursuant to G.L. Ch. 90C § 1, a copy of which is attached as Exhibit A.

2. On June 2, 1976, a hearing was held in the District Court of Central Middlesex on the criminal complaint charging Donald Montrym with operating under the influence of intoxicating liquor, driving to endanger, and failing to have his registration in his possession. The driving under the influence charge was dismissed and a copy of the record of the district court on this complaint is attached hereto as Exhibit B. Mr. Montrym was found not guilty on the driving to endanger charge. On the "No registration" charge, Mr. Montrym was found guilty and fined $15.

3. On May 25, 1976, the Registrar of Motor Vehicles of the Commonwealth of Massachusetts, Robert A. Panora, received from the Acton Police Department a Report of Refusal to Submit to a Chemical Test. A copy of the report is attached hereto and marked Exhibit C and is hereby incorporated by reference. The report was made on the form approved by the Registrar.

4. On June 2, 1976, Mr. Montrym's attorney wrote the Registrar of Motor Vehicles requesting a stay of any possible action that might be taken with respect to Mr. Montrym's license. A copy of this request is attached as Exhibit D, and was received by the Registrar on June 3, 1976.

5. On June 7, 1976, the Registrar suspended Donald Montrym's driver's license on the basis of the report referred to above in paragraph 3 and pursuant to G.L. Ch. 90 § 24(1)(f). A copy of the Registrar's notice of suspension is attached hereto and marked Exhibit E.

6. On June 7, 1976, Mr. Montrym's attorney wrote the Board of Appeals for a hearing pursuant to G.L. Ch. 90 § 28, a copy of his letter being attached as Exhibit F. This letter was received by the Board of Appeals on June 8, 1976.

7. Mr. Montrym surrendered his driver's license to the Registrar on June 8, 1976.

8. On June 8, 1976, the Board of Appeals mailed a set of forms to Mr. Montrym's attorney and requested that these be completed in duplicate. A copy of the Board of Appeals' request is attached as Exhibit G. This request was received on June 10, 1976 by Mr. Montrym's attorney, completed, mailed back to the Board of Appeals on June 10, 1976, and received by the Board of Appeals on June 11, 1976.

9. On June 11, 1976, the Registrar replied to Mr. Montrym's attorney's letter of June 2, 1976 referred to above in paragraph 4, a copy of said reply being attached as Exhibit H.

10. On June 24, 1976, the Board of Appeals notified Mr. Montrym that he could have a hearing on July 6, 1976, a copy of said notice being attached as Exhibit I.

11. On June 28, 1976, Mr. Montrym, by his attorney, made demand for the return of his driver's license upon the Registrar, a copy of said demand being attached as Exhibit J. The Registrar refused this demand, but Mr. Montrym's license was returned on July 15, 1976, pursuant to an order issued by this court at 2:30 p.m. July 9, 1976.

12. After delivering his license to the Registrar pursuant to a suspension notice for ninety days in the form of Exhibit E, a licensee may obtain an immediate hearing pursuant to G.L. Ch. 90 § 24(1)(g). At such a hearing, the licensee may be represented by an attorney. The procedure at the hearing is as follows: the hearing officer examines the Report of Refusal to Submit to Chemical Test to determine that it is complete and complies with the requirements of Ch. 90 § 24(1)(f). If the Report is not complete or does not comply, the hearing officer returns the driver's license in hand to the licensee. If the Report is complete and complies, the burden is on the licensee to show that one of the factual issues set forth in Ch. 90 § 24(1)(g) was in the negative, i.e., there was no probable cause, no arrest, or no refusal to submit. The hearing officer will adjourn the hearing at his own request, or upon the request of the licensee, to permit the police officers or other witnesses to be brought in for questioning, or for counter affidavits to be submitted, or to allow the hearing officer to interview witnesses in the field.

Witnesses at a hearing may be questioned by the hearing officer, or a licensee, or his attorney. From an adverse decision of the Registrar, a licensee may take an appeal to the Board of Appeals pursuant to G. L. Ch. 90 § 28.

13. In 1975, 884 persons were fatally injured in automobile accidents. Of these 884 fatalities, 283 resulted from accidents in which alcohol was determined as the attributing cause.

STEVEN A. RUSCONI, ROBERT W. HAGOPIAN.
Assistant Attorney General.

EXHIBIT A.

COMMONWEALTH OF MASSACHUSETTS — *Acton* — POLICE DEPT.

VIOLATION NOTICE — 93502R

OPERATOR *Donald E. Montrym* BIRTH *4-10-30*
ADDRESS *417 Arlington St., Acton* HEIGHT *5' 1"*
LIC. NO. *052223814* STATE *MA* CLASS *2* EXP. *4-10-77*
OWNER *Same* MAKE *'74 Matador*
ADDRESS *Same* TYPE *Station Wagon*
REG. NO. *31702W* STATE *MA* ISS. VEH. COLOR *Brown*
DATE OF OFFENSE *5-15-76* PLACE *Arlington St.* TIME *8:30 p.m.*
VIOLATOR: OPERATOR [X] OWNER [ ] VIOLATION(S): *1. Operating under the influence of alcohol; 2. Operating to endanger; 3. No Reg. in possession. Headed north on Arlington St. resulting in MV accident.*

SPEED POSTED ——— MPH ESTIMATED [ ] CLOCKED [ ] RADAR [ ]
ROAD DIVIDED: YES [ ] NO [X] NO. OF LANES [X]
DISTRICT: TH. SETT. [X] RURAL [ ] SURFACE: DRY [X] WET [ ] ICE [ ] SNOW [ ]
TRAFFIC: HEAVY [ ] MEDIUM [ ] LIGHT [X] DATE CITATION WRITTEN *5-15-76*
WARNING [ ] ARREST [X] COMPLAINT [ ] COURT LOCATION *Concord*
POLICE OFFICER *Calvin H. O'Coin*

EXHIBIT B.

COMMONWEALTH OF MASSACHUSETTS.
DISTRICT COURT OF CENTRAL MIDDLESEX.

COMMONWEALTH

vs.

DONALD E. MONTRYM

VIOLATION OF MOTOR VEHICLE LAW

OPERATING MV.V UNDER INF. INTOX. LIQ General Laws, Chapter 90, Section 24.

Penalty: Fine not less than $35. nor more than $1,000., or imprisonment not less than 2 weeks nor more than 2 yrs., or both such fine & imprisonment.

ARREST 5-17-76 [*sic*]

DEFT. NOTIFIED OF RIGHT TO HAVE COUNSEL
_____ J.

Atty. Bates filed app — plea NG C. 6-2-76 FORTE, J.

5-28-76 Motion to Suppress & affidavit filed.

Dismissed. Breathalyzer refused when requested within ½ hr of arrest at station. See affidavit & memorandum.

GELINAS, J.

To the District Court of Central Middlesex,
in the County of Middlesex.

George W. Robinson of Acton in said County, in behalf of the Commonwealth of Massachusetts, on oath, complains that Donald E. Montrym of Acton on 5-15-76 at Acton aforesaid upon a way or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licenses, did operate a motor vehicle while under the influence of intoxicating liquor against the peace of said Commonwealth and contrary to the form of the Statute in such case made and provided.

GEORGE W. ROBINSON,
Complainant.

Received and sworn to 5-17-76 before said Court.

EDWARD F. SULESKY,
Clerk of said Court.

At the District Court of Central Middlesex, holden at Concord, within the County of Middlesex, for the transaction of Criminal Business.

GEORGE W. ROBINSON of Acton in the County of Middlesex, complainant, and DONALD E. MONTRYM of Acton in the County of Middlesex, defendant.

Complaint for operating a motor vehicle under the influence, G.L. CH 90:24.

I hereby certify that the above entitled complaint was duly entered in said Court on the 17th day of May A.D. 1976.

That on the 17th day of May A.D. 1976, the said defendant is arraigned in said Court upon said complaint, and he is asked by the Court whether he is guilty or not guilty of the allegations contained in said complaint, and the said defendant pleads and says that he is not guilty, and the hearing thereon is then and there continued from time to time to the second day of June A.D. 1976 on which day trial is had and the Court thereupon dismissed the complaint.

IN TESTIMONY that the foregoing is a true copy of record in the case of the Commonwealth vs. DONALD E. MONTRYM from the records of said Court, together with an attested copy of the complaint, I hereunto subscribe my name and affix the seal of said Court, at Concord aforesaid, this 25th day of June A.D. 1976.

Attest:_____
Clerk of said Court.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. DISTRICT COURT OF
CENTRAL MIDDLESEX
CRIMINAL #4703-5

COMMONWEALTH OF MASSACHUSETTS

v.

DONALD E. MONTRYM

Motion to Suppress Evidence.

Now comes the defendant, being aggrieved by an unlawful arrest and by deprivation of his rights to submit to a breathalyser test, promptly to be informed of his right to a bail hearing respectfully moves this Honorable Court to suppress:

1. Any evidence as to the physical condition or actions of the plaintiff on or about the evening of May 15, 1976.
2. Any evidence as to his possession or lack of certificate of registration at said time.
3. Any evidence of admissions by way of act or statement of the defendant obtained directly or indirectly from his arrest or from deprivation of his rights while in custody.

The defendant states as grounds for this motion:

1. There was no probable cause for the police to believe at the time of his arrest that the defendant had no certificate of registration on his person or in his vehicle.
2. There was no probable cause for the police to believe at the time of arrest that the defendant had been operating under the influence of intoxicating liquor.

3. There was no probable cause for the police to believe at the time of arrest that the defendant was in the process of operating his motor vehicle so as to endanger the public.
4. There was no existing breach of the peace culpably attributable to the defendant at the time of his arrest.
5. The defendant was denied the opportunity to exculpate himself by means of breathalyser test.
6. The defendant was denied the opportunity to prepare his defense by means of his not being informed of his right to bail hearing.

By his attorney,
RICHARD BATES HARRIS.

NOTICE OF MOTION
AND
CERTIFICATE OF NOTICE OF MOTION

To: Clerk For Criminal Business
District Court of Central Middlesex
Concord, MA 01742

To: Sergeant George W. Robinson
Acton Police Department
Acton, MA 01720

Please place the above action on list for June 2, 1976 at 9:00 a.m. for hearing of the above motion.

I certify that the above motion has been filed and notice given as required by rule of court.

RICHARD BATES HARRIS,
Attorney for moving party.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT OF
CENTRAL MIDDLESEX
CRIMINAL #4703-5

COMMONWEALTH OF MASSACHUSETTS

v.

DONALD E. MONTRYM

Affidavit in Support of Motion to Suppress.

The undersigned being duly sworn, deposes and says to the best of his knowledge and belief:

1. Saturday evening, May 15, 1976, after stopping his motor vehicle at the intersection of Arlington Street with Summer Street, Acton, looked both ways, saw nothing, and then proceeded across Summer Street toward Acton.

2. When he was nearly through the intersection, his vehicle was struck in the right rear wheel well behind the right rear wheel by a motorcycle. Both vehicles were disabled.

3. The Acton police arrived to find the undersigned outside his vehicle and his son Joey inside it. After vainly requesting the undersigned to produce his registration (the same being in his home a block away), the police ordered the undersigned to spread his body over the side of his vehicle. He was frisked and manacled with his hands behind his back. This was the first time your undersigned has ever been arrested or searched or apprehended by any police.

4. The undersigned was not allowed to make any arrangements for the care of his son Joey, of whom he is the sole surviving parent.

5. Upon being transported to the Acton police station, the undersigned kept fretting about the welfare of his son. Upon being told he had the right to use the telephone, the undersigned attempted without success to telephone an attorney.

6. The undersigned was asked whether he wanted to submit to a breathalyser test and refused, not knowing that refusal would cost him his license but acceptance, regardless of the results thereof, would not cost his license under certain conditions. He was not informed of the cost to him financially of said breathalyser test or of any alcoholic prevention program.

7. The undersigned does not recall being informed of any right to bail.

8. The undersigned was then visited in the Acton police jail at about 9:05 p.m. by attorney Richard Bates Harris. Although he has long known attorney Harris, he did not summon him and was surprised and glad to see him.

9. After requesting attorney Harris' advice, the undersigned requested a breathalyser test and a bail hearing.

10. The Acton police refused to give the undersigned a breathalyser test despite repeated requests by the undersigned and said Harris from 9:07 till 10:07 p.m. The police said that there was a functioning breathalyser machine and a competent operator at hand.

11. At 9:45 p.m. a bail hearing was held and the defendant undersigned was released on personal cognizance till May 17, 1976.

12. The undersigned believes that a breathalyser test would have confirmed his belief that he was not intoxicated with an alcoholic beverage nor under the influence of intoxicating liquor that evening.

DONALD E. MONTRYM

[Jurat omitted in printing.]

EXHIBIT C.

COMMONWEALTH OF MASSACHUSETTS

REPORT OF REFUSAL TO SUBMIT TO CHEMICAL TEST

To: *The Registrar of Motor Vehicles* *100 Nashua Street* *Boston, Ma. 02114*	From: *Acton Police Department* *365 Main Street* *Acton, Ma. 01720*
Re: *Donald E. Montrym* (Operator's Name)	*same* (Vehicle Owner)
417 Arlington Street (Address)	*same* (Address)
Acton, Mass. (City) (State)	*same* (City) (State)
4/10/30 *4/10/77* (D/O/B) (Exp. Date of Lic.)	*31702W* *Mass.* (Reg. No.) (State)
052223814 *Mass.* Lic. No. — Issuing State)	*2/78* (Exp. Date of Registration

Was the operator arrested on a charge of operating a motor vehicle while under the influence of intoxicating liquor upon a way or in a place to which the public has a right of access as invitees or licensees in violation of Section 24 of Chapter 90 of the General Laws?

A-2J-90 DL7017 YES x NO ____

Date of Arrest 5/15/76 Location Arlington and Summer Sts.
Name of Arresting Police Officer Calvin O'Coin

State reasonable grounds as follows to believe that the said operator committed said violation:

(1) State operator's driving behavior and details of pursuit (if any) and apprehension:

(2) State symptoms of intoxication: *A strong odor of an alcoholic beverage emitted from his person, he was glassy eyed and unsteady on his feet and he had to hold onto the st. marker to maintain his balance, also spoke in a slurred fashion.*

The said operator was offered a chemical test of analysis of his breath, but that said operator refused to submit to said test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the Commonwealth would be suspended for a period of ninety days for said refusal, in the presence of the undersigned and a third person witnessing such refusal.

At Acton Police Dept. 5/15/76 8:45 P.M.
(Place, Date and Time of Refusal)

Commonwealth of Massachusetts

Middlesex SS.
(County)

Signed under the penalties of perjury this 15th day of May 1976.

CALVIN O'COIN
Signature and title of police officer (before whom such refusal was made

Ptl. RICHARD GERVAIS
Signature of third person witnessing refusal

CHAUNCEY R. FENTON
Police Chief or authorized person

EXHIBIT D.

June 2, 1976

Registry of Motor Vehicles
100 Cambridge Street
Boston, MA 02114

RE Donald E. Montrym
417 Arlington Street, Acton
License #052223814 Mass
Registration #71202W Mass
Acton Police Department Citation #93592R
Incident: May 15, 1976

Gentlemen:

On May 15, 1976, the above operator was reported to have refused to submit to the breathalyser. On June 2, 1976 at 10:00 a.m. at the District Court of Central Middlesex, the enclosed motion to suppress was heard. Justice Andre A. Gelinas then dismissed the complaint for operating under the influence on ground #5 listed in the motion and then denied the motion as to the two other complaints, operating to endanger and no registration certificate in possession.

On June 2, 1976 at 2:00 p.m. the same judge heard evidence on the remaining complaints and found the defendant not guilty of driving to endanger and guilty of the remaining charge with $15 fine.

I enclose photocopies of the motion and supporting affidavit and request that any action to have Mr. Montrym's

license be stayed indefinitely so that no further hearing be necessary.

Please advise whether you may grant my request.

Very truly yours,

RICHARD BATES HARRIS,
Attorney for Donald E. Montrym.

ADDRESS ANY INQUIRY TO SUSPENSION SECTION AND GIVE FILE NUMBER. YOUR CASE WILL NOT BE REVIEWED UNTIL YOUR LICENSE IS SURRENDERED OR REVOKED. IF LICENSE IS RECEIVED AT THE REGISTRY OFFICE

NOTICE OF ACTION
BY THE REGISTRAR

THE COMMONWEALTH OF MASSACHUSETTS

REGISTRY OF MOTOR VEHICLES
100 NASHUA STREET BOSTON, MASS 02114

Burroughs

ADDRESSEE	DATE OF BIRTH	DATE OF SUSPENSION OR REVOCATION
MCNTRYM, DONALD E 417 ARLINGTON ST ACTON MA 01720	04-10-30 2	06-07-76

YOU ARE HEREBY NOTIFIED THAT IN ACCORDANCE WITH STATUTORY AUTHORITY I HAVE THIS DAY

SUSPENDED YOUR LICENSE TO OPERATE MOTOR VEHICLES

FOR THE REASON SHOWN IN CODE BELOW
RETURN ONLY ITEM(S) NOTED ABOVE

THIS ACTION IS EFFECTIVE AS OF THE HOUR IT WAS ISSUED AND YOU MUST COMPLY WITH IT IMMEDIATELY. YOU ARE SUBJECT TO ARREST IF YOU FAIL TO DO SO.

[redacted]
REGISTRAR OF MOTOR VEHICLES

FOLD

REASON (CODED) OVER	LIC. PERMIT OR REG. NUMBER	PERIOD OF TIME	FILE NUMBER	LOCATION AND DATE OF OFFENSE	MO	DAY	YR
2J	052223814	90 DAYS	CL07017	ACTON	05	15	76

IMPORTANT

When your LICENSE to operate motor vehicles has been suspended or revoked you must CEASE OPERATING and DELIVER TO ME AT ONCE said license and/or permit. You must not again operate a motor vehicle until your license has been reinstated.

When your RIGHT TO OPERATE has been suspended you MUST NOT OPERATE and you cannot apply for a learner's permit or a license until your right to operate has been reinstated. If you already hold a Massachusetts license and/or permit you MUST SURRENDER IT AT ONCE. If you are a non resident you cannot operate on your out-of-state license until your right to operate has been reinstated.

A suspended license and/or permit may be either mailed in the enclosed envelope or surrendered at any Registry Office. Bring this notice.

When the REGISTRATION OF YOUR MOTOR VEHICLE or the right to have it operated has been suspended or revoked operation of such vehicle must cease at once, and if the vehicle is registered in Massachusetts, the registration certificate and number plates must be DELIVERED TO ME IMMEDIATELY.

CH 90 2B RIGHT OF APPEAL — ANY PERSON AGGRIEVED BY A RULING OR DECISION OF THE REGISTRAR MAY WITHIN TEN DAYS THEREAFTER APPEAL FROM SUCH RULING OR DECISION TO THE BOARD OF APPEAL ON MOTOR VEHICLE LIABILITY POLICIES AND BONDS

Form R-50 100M REV. 6-74 092030

EXHIBIT E.

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EXPLANATION OF CODES • INDICATES ACTION MANDATORY

- • 1A You were convicted of operating a motor vehicle while under the influence of intoxicating liquor.
- • 1B You were convicted of not stopping and making known your name, residence and register number of the motor vehicle you were operating after knowingly colliding with or otherwise causing injury to a person.
- • 1C You were convicted of going away without stopping and making known your name, residence, and the register number of the motor vehicle you were operating after knowingly colliding with or otherwise causing injury to property.
- • 1D You were convicted of operating a motor vehicle negligently so that the lives or safety of the public might be endangered.
- • 1E You were convicted of operating a motor vehicle recklessly.
- • 1F You were convicted of operating a motor vehicle upon a bet or wager.
- • 1G You were convicted of operating a motor vehicle in a race.
- • 1H You were convicted of using a motor vehicle without authority.
- • 1H-1 You were convicted of operating a motor vehicle without authority after suspension or revocation of your license.
- • 1J You were convicted of loaning your operator's license or learner's permit to be used by another person.
- • 1K You were convicted of falsely impersonating a person named in an application for an operator's license.
- • 1L You were convicted of making a false statement in an application for an operator's license or learner's permit.
- • 1M You were convicted of making a false statement in an application for registration of a motor vehicle or trailer.
- • 1N You were convicted of procuring false impersonation in an application for a license to operate motor vehicle or a learner's permit.
- • 1P You were convicted three times of speeding and/or other offenses of chapter 90, sections 16, 17, 18, within a calendar year.
- • 1Q After an investigation of a fatal accident in which a motor vehicle operated by you was involved and a hearing, I am unable to determine that the accident occured without serious fault on your part.
- • 1R You were convicted of stealing a motor vehicle or trailer or any illegal acts in connection with Ch. 266, Sec. 28.
- • 1T You were convicted of operating under the influence of a narcotic or other drug or vapor noted in chapter 90, section 24.
- • 1X You were convicted of violation of Section 24B of Chapter 90.
- • 2A Pending an investigation, it appears that a motor vehicle operated by you was involved in an accident that resulted in a death.
- • 2B You failed to satisfy a property damage judgment.
- • 2D You defaulted a court summons.
- • 2E Failure to pay a motor vehicle Excise tax.
- • 2G You were issued three warning citations in one year.
- • 2J You refused to submit to a chemical test.
- • 2K You have been designated an habitual traffic offender.
- 2P You tendered a bad check.
- 3A You committed a violation of the motor vehicle laws of a nature which gives me reason to believe that your continued operation would be so seriously improper as to constitute an immediate threat to the public safety. You are entitled to a hearing within 30 days.
- 3B I have reason to believe that you are an incompetent person to operate motor vehicles (lack of ability, legal qualification or fitness to operate or register a motor vehicle).
- 3C I have reason to believe that you did improperly operate a motor vehicle.
- 3D You, a minor, were convicted or adjudged delinquent of transporting an alcoholic beverage.
- 3D 1 You, a minor were transporting an alcoholic beverage.
- 3D 2 You were adjudged a delinquent child (chapter 119, section 58 B).
- 3E Result of a hearing on a violation of the motor vehicle or related laws.
- 3G You failed to file a report of an accident as required by law.
- 3H I have determined that your motor vehicle or trailer is improperly equipped or otherwise unfit to be operated.
- 3J You did allow your motor vehicle to be operated in violation of the laws and regulations pertaining to motor vehicles.
- 3K You were convicted of disposing of garbage in violation of statute.
- 3L You were convicted of abandoning a motor vehicle.
- 3M You were convicted of a fraudulent claim.
- 3N You were convicted of not displaying flares.
- 3P You failed to notify the registrar of a change of name, or address, or mail address within 30 days.
- • 4D You have failed to file security in accordance with the provisions of general laws, chapter 90, section 3G.

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EXHIBIT F.

June 7, 1976

Board of Appeal on
Motor Vehicle Liability Policies
& Bonds
100 Cambridge Street
Boston, MA 02202

RE Donald E. Montrym
License 052223814
File DL07017
Acton 05-15-76
Suspension 06-07-76 : 2J

Gentlemen:

The above operator herewith requests a hearing on the decision that his license be suspended, on the ground that the District Court of Central Middlesex (Docket #4703) on June 2, 1976 found that he did not refuse to submit to a breathalyser test within the meaning of G.L. 90 s. 24 (1) (f) and hence the complaint was dismissed forthwith.

Very truly yours,

RICHARD BATES HARRIS.

EXHIBIT G.

Dear Sir:

Please complete form in duplicate & return to this office.

Thank you,

MARY EARNES,
Board of Appeal.

EXHIBIT H.

June 11, 1976

Richard B. Harris
Counselor At Law
11 Park Street
Leominster, Mass 01453

RE: Donald E. Montrym
D.O.B. 4/10/30

Dear Sir:

In reference to your letter of June 2, 1976 concerning the above-named, this is to advise you that his license has already been suspended and said license must be returned to this office immediately.

Very truly yours,

ROBERT A. PANORA,
Registrar

DO'N
DL7017

CC: Donald E. Montrym

EXHIBIT I.

The Commonwealth of Massachusetts

BOARD OF APPEAL ON MOTOR VEHICLE LIABILITY POLICIES AND BONDS

June 24, 1976

Donald E. Montrym
417 Arlington Street
Acton, Mass.

cc: Richard Bates Harris
11 Park Street
Leominster, Mass.

Your appeal from the decision of the Registrar of Motor Vehicles has been received, and you are notified that, acting under the provisions of Section 28, Chapter 90 of the General Laws, as amended, the Board of Appeal on Motor Vehicle Liability Policies and Bonds will give a hearing on the matter in *Room 1806, Leverett Saltonstall Building, 100 Cambridge Street, Boston, Massachusetts, 02202.* on Tuesday, July 6, 1976 at 10:00 A.M.

Please arrange to have present at this hearing such witnesses as you may wish to have testify as to the facts in the case.

If you are under the jurisdiction of either the Probation Department or the Parole Board, written notice must be sent to that agency advising them of your appearance before this Board. A copy of the notice to that agency must be presented by you at the hearing.

Very truly yours,

RALPH A. IANNACO,
Secretary,
Board of Appeal

EXHIBIT J.

June 25, 1976

Mr. Robert A. Panora
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts

Dear Sir:

Please be advised that I represent Mr. Donald Montrym, 417 Arlington Street, Acton, Massachusetts; date of birth April 10, 1930; Massachusetts license no. 052223814. On June 7, 1976, you suspended Mr. Montrym's license for ninety days for refusal to submit to a breathalyzer test out of an incident occurring on May 15, 1976 and in accordance with G.L. Ch. 90 §24(1)(f). See your file no. DL 07017.

Please be advised that Mr. Montrym did not refuse to submit to a breathalyzer test on May 15, 1976 and that he was acquitted of driving under the influence of intoxicating liquors, G.L. Ch. 90 §(1)(a), on June 2, 1976, complaint no. 4703 in the District Court of Central Middlesex. In addition, the district court made a specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one. This finding is binding upon you. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

Mr. Montrym depends upon his driver's license for his livelihood. Notwithstanding G.L. Ch. 90 §24(1)(g), your action in suspending his license without affording him a prior hearing is a patent deprivation of his liberty and property without due process and is in contravention of the Fourteenth Amendment of the United States Constitution.

See *Cicchetti* v. *Lucey*, 337 F. Supp. 215 (1974); and *Pollard* v. *Panora*, ____ F. Supp. ____ (D. Mass. 1976).

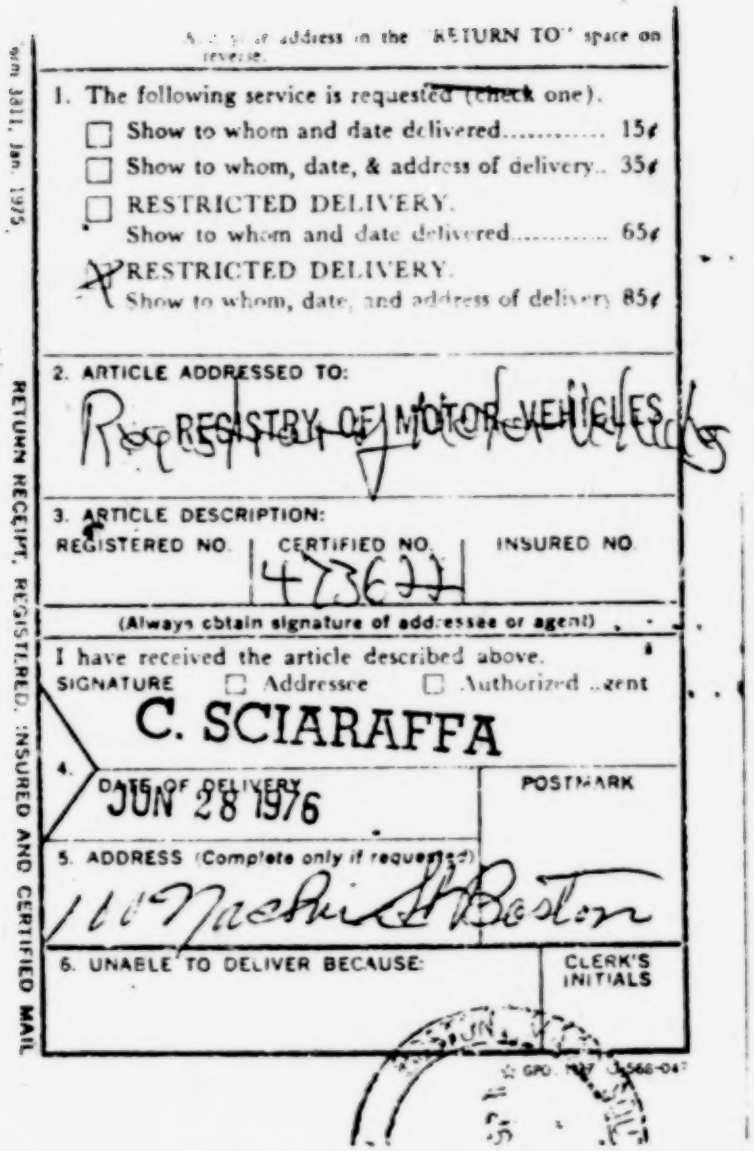
Demand is hereby made upon you to immediately reinstate Mr. Montrym's driver license. If you do not take this action and notify me accordingly by 9:30 a.m., Wednesday, June 30, 1976, I will appear in the federal district court for the district of Massachusetts and request that a restraining order be issued against you from continuing to suspend Mr. Montrym's license. I am also going to request the court to award actual and punitive damages.

Very truly yours,

ROBERT W. HAGOPIAN

RWH:hfc

cc.: Richard Harris, Esq., Co-Counsel
Robert Kelly, Esq.
James Manning



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Form 3811, Jan. 1975

... address on the "RETURN TO" space on reverse.

1. The following service is requested (check one).
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- ☒ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Registry of Motor Vehicles
~~REGISTRY OF MOTOR VEHICLES~~

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 473627 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
C. SCIARAFFA

4. DATE OF DELIVERY JUN 28 1976 | POSTMARK

5. ADDRESS (Complete only if requested)
100 Nashua St Boston

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

JUN

☆ GPO ... 3568-047

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Partial Summary Judgment Pursuant to FRCP 56.

Now comes the plaintiff upon his complaint, the defendant's answer, the agreed statement of facts with exhibits, and the attached affidavits, and moves this Court to issue a judgment declaring G.L. Ch. 90 §24(1)(f) unconstitutional on its face and/or applied.

By his attorney,

ROBERT W. HAGOPIAN

_____

[The original Decision and Opinion of the three-judge District Court, reported at 429 F. Supp. 1157 (D. Mass., March 25, 1977) are incorporated in the appellant's Jurisdictional Statement.]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

DONALD E. MONTRYM,
INDIVIDUALLY AND IN BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

v.

ROBERT A. PANORA, REGISTRAR
OF MOTOR VEHICLES, AND HIS
SUCCESSORS IN OFFICE.

CIVIL ACTION
No. 76-2560-F

Before Campbell, Circuit Judge, Tauro and Freedman, District Judges.

JUDGMENT.

April 4, 1977.

FREEDMAN, D.J.

This matter came on for hearing on plaintiff's motion for summary judgment on the issue of the constitutionality of M.G.L. c. 90 § 24(1)(f). The case having been duly argued by counsel and a decision having been rendered in an opinion filed March 25, 1977, it is hereby ORDERED, ADJUDGED and DECREED that the plaintiff's motion be granted.

United States Circuit Judge

FRANK H. FREEDMAN,
United States District Judge

JOSEPH L. TAURO,
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Defendant's Motion for Entry of Judgment.

The defendant moves this court to enter judgment on plaintiff's motion for partial summary judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure. If the court requests, attorney for defendant will submit a proposed form of judgment.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: April 7, 1977.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

v.

CIVIL ACTION
No. 76-2560-F

ROBERT A. PANORA, REGISTRAR OF MOTOR VEHICLES, AND HIS SUCCESSORS IN OFFICE.

Before Campbell, Circuit Judge, Tauro and Freedman, District Judges.

Clarification of April 4, 1977 Judgment.

April 12, 1977.

FREEDMAN, D.J.

Defendant has apparently sought a clarification of the Judgment of April 4, 1977. For the reasons set forth in the Opinion filed March 25, 1977, that Judgment declares M.G.L. c.90 § 24(1)(f) unconstitutional on its face as it denies licensees due process and the defendant is thereby enjoined from enforcing this statutory provision.

FRANK H. FREEDMAN,
United States District Judge

JOSEPH L. TAURO,
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Notice of Appeal.

Notice is hereby given that Robert A. Panora, defendant in the above entitled action, hereby appeals to the United States Supreme Court from the final judgment granting plaintiff's motion for partial summary judgment on the issue of the constitutionality of Mass. Gen. Laws C. 90, § 24(1)(f). Said judgment was entered on April 4, 1977 in the United States District Court for the District of Massachusetts. Appeal is taken to the United States Supreme Court pursuant to 28 U.S.C. § 1253.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: April 11, 1977.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Contempt Order.

Plaintiff shows to the court as follows:

1) On March 25, 1977, this court enjoined the defendant Registrar of Motor Vehicles from enforcing M.G.L. Ch. 90 §24(1)(f) as against the certified class of plaintiffs;

2) The defendant Registrar has received a copy of this court's opinion of March 25, 1977 enjoining him from enforcing M.G.L. Ch. 90 §24(1)(f);

3) The plaintiffs have made a further demand for the return of their licenses, a copy of which is attached, and the defendant Registrar has refused this demand;

4) The defendant has nevertheless wholly failed to comply with the order of this court in that he has publicly refused to return the plaintiff's licenses which he previously revoked pursuant to M.G.L. Ch. 90 §24(1)(f) and which he presently has in his possession;

5) The refusal of the defendant to obey the order of this court on March 25, 1977 is calculated to cause the plaintiffs irreparable harm caused by the continued loss of their driver's licenses.

WHEREFORE, the plaintiffs demand that the defendant Registrar be held in contempt of court, for his neglect and refusal to comply with and obey the order of this court on March 25, 1977 enjoining him from enforcing M.G.L. Ch. 90 §24(1)(f); and that he be required to show cause

before this court why he should not be so held in contempt of court.

By his attorney,

ROBERT W. HAGOPIAN

April 7, 1977

Mr. Robert A. Panora
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02110

Dear Sir:

I have been advised by your attorneys that as of this date you have failed to return the driver's license to certain motorists within the class certified in the class action, *Montrym* v. *Panora*, CA 76-2560F. Your action in withholding these licenses is contrary to the opinion of the federal district court which declared Ch. 90 §24(1)(f) unconstitutional and which enjoined you from enforcing M.G.L. Ch. 90 §24(1)(f). Further, the certified class includes all those persons "whose Massachusetts license to operate a motor vehicle has been suspended" pursuant to Ch. 90 §24(1)(f). On behalf of the class, demand is hereby made upon you to cease and desist from withholding these licenses and to immediately return the licenses forthwith. Unless I have your telephone assurance by 10:00 a.m., Tuesday, April 12, 1977 that these

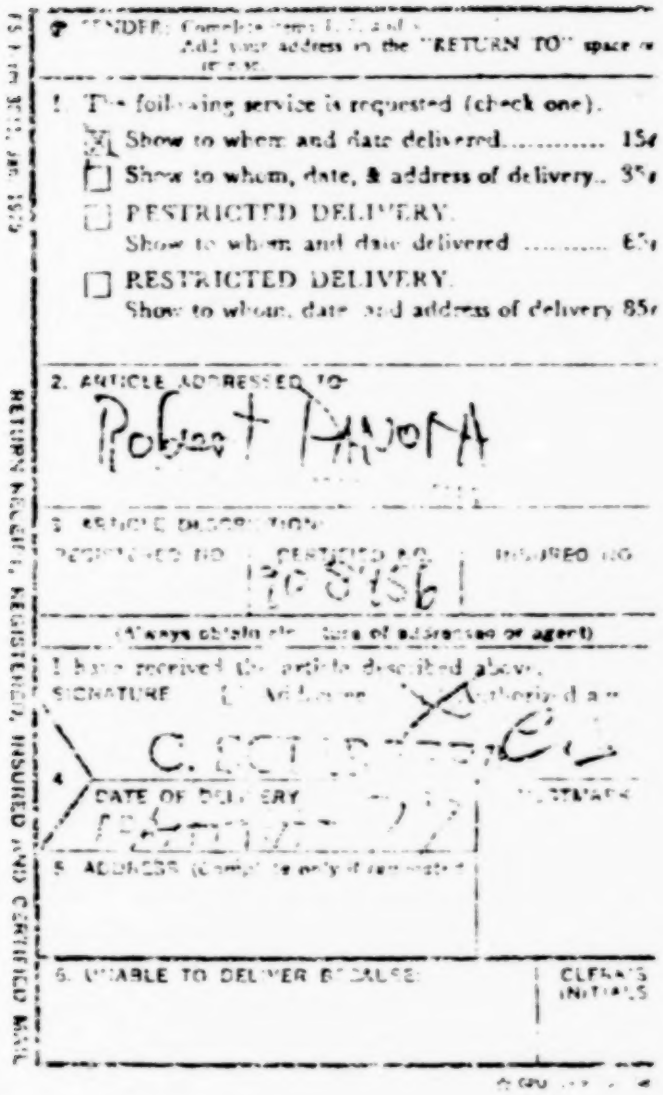
licenses will be returned forthwith, I will request the federal district court to hold you in contempt.

Very truly yours,

ROBERT W. HAGOPIAN

RWH:hfc

cc: Robert Kelly, Esq.
Steven Rusconi, Esq.



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P "SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on
ITEM 1.

1. The following service is requested (check one).
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☐ RESTRICTED DELIVERY.
Show to whom and date delivered ..... 65¢
☐ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Robert Panora

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. | INSURED NO.
P 8456

(Always obtain signature of addressee or agent)
I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
C. [illegible]

4. DATE OF DELIVERY
FEB [illegible] 77

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

☆ GPO [illegible]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

DONALD E. MONTRYM,
INDIVIDUALLY AND IN BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiff

v.

CIVIL ACTION
No. 76-2560-F

ROBERT A. PANORA, REGISTRAR
OF MOTOR VEHICLES, AND HIS
SUCCESSORS IN OFFICE,
Defendants

Final Judgment.

This cause came on to be heard on plaintiff's motion for summary judgment and motion to certify the class; and the court having heard oral arguments and having considered the parties agreed statement of facts and documents; and it appearing that the M.G.L. Ch. 90 § 24(1)(f) is unconstitutional on its face in accordance with the opinion of this court filed on March 25, 1977 which is incorporated herein, and more specifically in that it violates the due process clause of the Fourteenth Amendment because it fails to provide a licensee an opportunity to respond prior to having his license revoked under the statute; and further that the defendant's continuing enforcement of M.G.L. Ch. 90 §24(1)(f) is and will cause irreparable injury to the plaintiffs by the loss of their driver's licenses and in accordance with said opinion; therefore:

IT IS HEREBY ORDERED, ADJUDGED, DECREED: that

1. The class in this section is certified as follows:
   All of those persons whose Massachusetts license to operate a motor vehicle has been, or is about to be suspended by the Registrar of Motor Vehicles or his predecessors or successors in office pursuant to Mass. General Laws Ch. 90 §24(1)(f);

2. Since M.G.L. Ch. 90 §24(1)(f) fails to provide a licensee with an opportunity to respond prior to suspension of his license in violation of the due process clause, it is declared unconstitutional on its face, and Robert A. Panora, Registrar of Motor Vehicles, his successors in office, his officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with them, be and they hereby are permanently enjoined and restrained from revoking the driver's licenses of plaintiffs pursuant to M.G.L. Ch. 90 §24(1)(f); and further the Registrar, his successors in office, his officers, agents, representative, employees, attorneys, and all persons in active concert and participation with them are ordered and directed to return by May 11, 1977 the driver's licenses of the plaintiffs which are now in their possession and which were previously revoked pursuant to M.G.L. Ch. 90 §24(1)(f).

FRANK H. FREEDMAN,
United States Judge
JOSEPH L. TAURO,
United States Judge

Issued at Boston on May 4, 1977

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Notice of Appeal.

Notice is hereby given that Registrar of Motor Vehicles for the Commonwealth of Massachusetts, the defendant in the above entitled action, hereby appeals to the United States Supreme Court from the final judgment granting plaintiff's motion for summary judgment on the issue of the constitutionality of Mass. Gen. Laws c. 90, § 24(1)(f). Said judgment was entered on May 4, 1977, in the United States District Court for the District of Massachusetts. Appeal is taken to the United States Supreme Court pursuant to 28 U.S.C. § 1253.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Docketed May 13, 1977, 3:23 P.M.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Stay of Judgment and Order Pursuant to Supreme Court Rule 18.

The Registrar of Motor Vehicles of the Commonwealth of Massachusetts, defendant in the above entitled action respectfully moves this Court for a stay of its judgment of May 4, 1977 declaring Mass. Gen. Laws c. 90, §24(1)(f) unconstitutional and enjoining the defendant from suspending licenses thereunder. The defendant has filed a Notice of Appeal to the Supreme Court of the United States and request that the Judgment of this Court be stayed pending a final disposition of the appeal by the Supreme Court. This motion is filed pursuant to Supreme Court Rule 18 and the grounds for the motion are as follows:

1. In its opinion, and judgment this Court held the Massachusetts Implied Consent Statute, Mass. Gen. Laws, c. 90, §24(1)(f), violates the Due Process clause of the Fourteenth Amendment by failing to provide for an opportunity to respond to the suspension of a motor vehicle operator's license for failure to submit to a chemical test or analysis of his breath. The ability of a state to enact such a statute poses a legal issue of fundamental importance demanding a resolution by the Supreme Court.

2. In its opinion this Court noted that the results of the chemical test are of great value in the prosecution of drunk driving cases. (Opinion 13).

3. The public interest in having a statute which requires a motor vehicle operator to submit to a chemical test or analysis as set forth in Mass. Gen. Laws, c. 90, §24(1)(f)

will be irreparably harmed if the judgment of this Court enjoining the defendant from enforcing the statute pending disposition of defendant's appeal. If the judgment of the Court is not stayed pending disposition of the appeal the availability of the result of a chemical test will be greatly if not completely diminished, and there will thereby be a less of a likelihood that those guilty of operating a motor vehicle under the influence of intoxicating liquor and cause damage while doing so will be convicted and punished. A subsequent reversal by the Supreme Court of the United States would not compensate for the harm suffered by the public due to the inability to obtain the results of a chemical test under the statute.

For these reasons and those contained in the accompanying affidavit and memorandum of law, the defendant respectfully requests a stay in this Court's Judgment pending final disposition of his appeal.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: May 13, 1977

5-24-77. After consultation with Tauro, J., the motion for stay is denied.

FREEDMAN, J.

Affidavit of E. Theodore Gunaris, Acting Registrar of Motor Vehicles.

I, E. Theodore Gunaris, depose and state the following:

1. Since April 15, 1977, as a result of a vacancy in the Office of Registrar of Motor Vehicles, I have been, under provisions of Chapter 16, Section 9 of the Massachusetts General Laws, exercising and performing the powers and duties of Registrar of Motor Vehicles.

2. It is my understanding the original concept of a mandatory suspension of an operator's license for refusal to submit to a chemical test was a legislative effort to assist law enforcement officials in the prosecution of criminal cases involving the operation of motor vehicles by motorists who were under the influence of intoxicating liquor.

3. It is my belief the Massachusetts Legislature in enacting the Implied Consent statute afforded innocent motorists a method in which to protect themselves by formulating evidence scientifically to prove they were not operating a motor vehicle while under the influence of intoxicating liquor, as believed by an arresting officer.

4. It is my opinion the statutory license suspension mandated by the Legislature for one who refuses to accept an offer of a breathalyzer test has increased the awareness of the motoring public to the dangers of driving after drinking intoxicating liquor.

5. The punitive measure society purposely imposed for commission of an offense under discussion, has, in my opinion, to some extent, discouraged such driving behavior which has proven to be a primary factor in fatal and non-fatal accidents.

6. The Massachusetts Registry of Motor Vehicles statistical findings show an increase of 38.7% from 1972 to 1975 in fatal accidents which were alcohol related and it is my

judgment that this mandatory forfeiture of license assures the law abiding motorists that they are afforded a reasonable measure of protection while interacting with other drivers on the ways of the commonwealth. The foregoing findings are based upon the compilation of statistics of the Department which are attached hereto.

7. I am also of the opinion, based upon thirty-one years experience with the Registry of Motor Vehicles, the mandatory license suspension for refusal to submit to a chemical test has proven to be the most successful countermeasure available or used in deterring motorists from operating motor vehicles after they have consumed intoxicating alcohol. Most of my associates in the field of law enforcement and motor vehicle administrators share this opinion.

Signed under the pains and penalties of perjury this twelfth day of May 1977.

E. THEODORE GUNARIS,
Acting Registrar of Motor Vehicles.

COMMONWEALTH OF MASSACHUSETTS.

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

Fatal Accidents — Alcohol Related — Years 1972-1975.

	1972	1973	1974	1975	% Change 1972 — 1975
Drivers Involved (all ages)	1,194	1,207	1,141	1,075	- 10.0
Drivers Involved (ages 18-20)	176 (14.7%)	231 (19.1%)	239 (20.9%)	208 (19.3%)	+ 18.2
Drivers Reported Drinking (all ages)	182	231	282	255	+ 40.1
Drivers Reported Drinking (ages 18-20)	32 (17.6%)	71 (30.7%)	91 (32.3%)	70 (27.5%)	+ 118.8
Persons Fatally Injured (all ages)	991	1,010	961	884	- 10.8
Persons Fatally Injured (ages 15-24)	328 (33.1%)	388 (38.4%)	415 (43.2%)	363 (41.1%)	+ 10.7
Persons Fatally Injured in Alcohol Related Accidents	204 (20.6%)	254 (25.1%)	313 (32.6%)	283 (32.0%)	+ 38.7

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

YEAR: 1972

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	2	0.2	1	0.5
16	20	1.7	0	0.0
17	59	4.9	8	4.4
18	61	5.1	12	6.6
19	60	5.0	8	4.4
20	55	4.6	12	6.6
21	65	5.4	17	9.3
22	47	3.9	12	6.6
23	56	4.7	15	8.3
24	46	3.9	8	4.4
25-29	153	12.8	22	12.1
30-34	107	9.0	24	13.2
35-39	100	8.4	12	6.6
40-44	69	5.8	12	6.6
45-49	76	6.4	11	6.1
50-54	57	4.8	4	2.2
55-59	46	3.8	2	1.1
60-64	44	3.7	1	0.5
65-69	24	2.0	0	0.0
70-74	17	1.4	1	0.5
75 years & over	27	2.3	0	0.0
not stated	3	0.2		
TOTALS	1,194	100.0	182	100.0

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

YEAR: 1973

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	6	0.5	2	0.9
16	22	1.8	5	2.2
17	62	5.1	19	8.2
18	78	6.5	30	13.0
19	80	6.6	25	10.8
20	73	6.0	16	6.9
21	62	5.1	14	6.1
22	45	3.7	9	3.9
23	43	3.6	11	4.8
24	37	3.1	6	2.6
25-29	166	13.8	23	9.9
30-34	106	8.8	20	8.7
35-39	74	6.1	11	4.8
40-44	62	5.1	10	4.3
45-49	75	6.2	6	2.6
50-54	56	4.7	12	5.2
55-59	45	3.7	4	1.7
60-64	33	2.7	7	3.0
65-69	31	2.6	0	0.0
70-74	15	1.3	1	0.4
75 years & over	27	2.2	0	0.0
not stated	9	0.8		
TOTALS	1,207	100.0	231	100.0

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

YEAR: 1974

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	3	0.3	1	0.3
16	23	2.0	3	3.1
17	61	5.3	11	3.9
18	87	7.6	44	15.6
19	83	7.3	24	8.5
20	69	6.0	23	8.2
21	58	5.1	19	6.7
22	64	5.6	18	6.4
23	44	3.9	6	2.1
24	40	3.5	11	3.9
25-29	151	13.3	43	15.2
30-34	98	8.6	28	9.9
35-39	65	5.7	14	5.0
40-44	48	4.2	9	3.2
45-49	55	4.8	12	4.3
50-54	48	4.2	3	1.1
55-59	42	3.7	6	2.1
60-64	34	3.0	4	1.4
65-69	31	2.7	3	1.1
70-74	14	1.2	0	0.0
75 years & over	17	1.5	0	0.0
not stated	6	0.5		
TOTALS	1,141	100.0	282	100.0

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

YEAR: 1975

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	2	0.2	0	0.0
16	22	2.0	9	3.5
17	69	6.4	17	6.7
18	76	7.1	31	12.1
19	69	6.4	23	9.0
20	63	5.9	16	6.3
21	57	5.3	14	5.5
22	61	5.7	16	6.3
23	51	4.7	14	5.5
24	45	4.2	8	3.1
25-29	157	14.6	43	16.9
30-34	80	7.4	17	6.7
35-39	59	5.5	13	5.1
40-44	53	4.9	15	5.9
45-49	57	5.3	5	1.9
50-54	50	4.7	7	2.7
55-59	30	2.8	3	1.2
60-64	23	2.1	0	0.0
65-69	21	2.0	2	0.8
70-74	7	0.6	0	0.0
75 years & over	20	1.9	2	0.8
not stated	3	0.3		
TOTALS	1.075	100.0	255	100.0

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Relief from Judgment.

The defendant in the above entitled action moves this court pursuant to Fed. R. Civ. P., Rule 60(b)(6) to modify the judgment entered on May 4, 1977. In support thereof, the defendant states the following:

1. In its opinion this Court held that the Massachusetts Implied Consent Statute, Mass. Gen. Laws, c. 90, § 24(1)(f) is unconstitutional because it fails to provide an opportunity to respond prior to the suspension of a motor vehicle operator's license for failure to submit to a test or chemical analysis of his breath as required under the statute.

2. In its opinion this Court noted that the results of a chemical test obtained under the statute are a valuable piece of evidence in the prosecution of a drunk driving case and that the state has an interest in encouraging motorists to take the test. (Opinion 13.)

3. The judgment entered by the Court enjoins the Registrar from enforcing the provisions of Mass. Gen. Laws, c. 90 § 24(1)(f). The effect of this judgment will be to greatly if not completely diminish the availability of results of chemical tests for use in the prosecution of drunk driving cases because a suspension for refusal to submit to a chemical test may not now be imposed.

4. Pending the appeal of this case, the interest of the Commonwealth in obtaining the results of a chemical test for use in the prosecution of drunk driving cases as well as the interest of an individual member of the class defined in the judgment of the Court in obtaining a hearing prior to

the suspension of his driver's license for failure to submit to a chemical test under the statute would be served by modifying the judgment to enjoin the defendant from suspending a license under the statute only in those cases where the motorist requests a hearing with the Board of Appeal on Liability Policies and Bonds. Such an order would allow the Commonwealth to maintain an effective breathalyzer statute and at the same time would allow those members of the class who disputed the contents of the report to respond prior to the actual suspension of their right to operate a motor vehicle.

This motion is filed with a Motion For Stay of Judgment pursuant to Supreme Court Rule 18 but is not filed in the alternative. Also, by filing this motion, the defendant does not intend to waive any arguments on appeal as to the appropriateness of the Judgment entered by this Court on May 4, 1977. Were the stay to be granted the problems necessitating this motion would be resolved.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: May 13, 1977

5-24-77. After consultation with Tauro, J., the motion for relief from judgment is denied.

FREEDMAN, J.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Defendant's Motion for Reconsideration of his Prior Motions (1) To Stay Judgment Pursuant to Supreme Court Rule 18; (2) To Modify Judgment Pursuant to F.R.Civ.P. 60(b)(6).

The defendant Massachusetts Registrar of Motor Vehicles moves that the court reconsider his prior Motion (1) To Stay Judgment Pursuant to Supreme Court Rule 18; (2) To Modify Judgment Pursuant to F.R.Civ.P. 60(b)(6).

As reason therefor he relies upon the intervening decision of *Dixon v. Love*, 45 LW 4447, rendered by the Supreme Court on May 16, 1977 in a case analogous to the present action. The defendant discusses the Supreme Court's analysis more fully in a Supplemental Memorandum of Law filed simultaneously with this Motion.

By his attorneys,

STEVEN A. RUSCONI,
MITCHELL J. SIKORA, JR.,
Assistant Attorneys General.

Docketed June 1, 1977, 5:13 P.M.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

No. CA 76-2560-F.

DONALD E. MONTRYM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

ROBERT A. PANORA, REGISTRAR OF MOTOR VEHICLES, AND HIS SUCCESSORS IN OFFICE

October 6, 1977.

Motion to stay and modify judgment denied.

Levin H. Campbell, Circuit Judge, dissented and filed opinion.

Robert W. Hagopian, Cambridge, Mass., for plaintiff.

Steven A. Rusconi, Asst. Atty. Gen., Boston, Mass., for defendant.

Memorandum.

Before CAMPBELL, Circuit Judge and FREEDMAN, and TAURO, District Judges.

TAURO, District Judge.

Defendant Registrar of Motor Vehicles has moved this court to reconsider its denial of his earlier motions to stay or modify the judgment entered against him by this court on May 4, 1977 in accordance with the opinion issued on March 25, 1977, 429 F.Supp. 393. He relies primarily upon the recent Supreme Court case of *Dixon* v. *Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). In that case, the Court upheld the provision of the Illinois Driver Licensing Law which empowers the Secretary of State to suspend or revoke, without a preliminary hearing, a license of a driver who had repeatedly been convicted for traffic offenses.

The plaintiff argues, and this court agrees, that several critical factors distinguish *Love* from this case. The significance of these distinguishing factors becomes apparent when they are analyzed in terms of the three prong test of *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) which requires consideration of:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903.

First, the private interest here is greater than that at stake in *Love*. There, the Court emphasized that the challenged Illinois statute allowed a person, upon notification of suspension or revocation, to request emergency relief in the form of a restricted permit. Ill.Ann.Stat. c. 95½ §§ 6-206(c)3 and (c)2.[1] The opportunity for such relief was a controlling factor in the Court's decision.

[1]Under the Illinois scheme, a commercial driver whose license has been suspended may submit an affidavit setting forth the facts of his employment and the number of offenses committed while driving a commercial vehicle. Upon receipt of the affidavit and the driver's license, the Secretary shall "thereupon send to said driver a permit to drive a commercial vehicle in his regular occupation." Alternatively, the commercial driver may seek a hearing. Ill.Ann.Stat. c. 95½ § 6-206(c)2. Consequently, the potential for commercial loss is considerably less than in Massachusetts.

The statutory scheme for the granting of hardship permits is somewhat more ambiguous. It is not clear whether the Secretary may consider and grant a limited license to prevent undue hardship prior to the hearing permitted by Ill. Ann. Stat. c. 95½ § 2-118, or only subsequent to such a hearing. § 6-206(c)3. While our dissenting brother believes that the hardship application may be made and considered only subsequent to a hearing, the Court's opinion in *Love*, supra, suggests that the hardship application may be considered prior to hearing. 431 U.S. 105, 97 S.Ct. 1723.

In view of the issue before the Supreme Court in *Love*, it is logical to conclude that consideration of what occurs after the post evidentiary hearing (under Ill.Ann. Stat. c. 95½ § 2-118) would be irrelevant. Yet the Supreme Court explicitly referred to the special provisions for holders of commercial licenses *and* for hardship cases, as indicated in the passage quoted above in the text, when it enumerated those factors which led the Court to conclude that the nature of the right involved in *Love* did not require an evidentiary hearing prior to license suspension or revocation.

Judge Campbell's references to stipulated facts in footnote 3 and throughout his dissenting opinion are troublesome. Our understanding is that defendant's proposed stipulation of facts was not executed by the plaintiff.

The private interest affected by the decision here is the granted license to operate a motor vehicle. Unlike the social security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. See *Goldberg* v. *Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). The Illinois statute includes special provisions for hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges. See n. 7, *supra*. We therefore conclude that the nature of the private interest here is not so great as to require us "to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews v. Eldridge*, 424 U.S., at 343, 96 S.Ct. [893] at 907. See *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

431 U.S. at 113, 97 S.Ct at 1728.

There is no comparable safeguard in the challenged Massachusetts statute. *See* Mass.Gen.Laws ch. 90, § 24(1)(f). We recognize that there is a statutory provision for a hearing at the time of the license surrender. Mass.Gen.Laws ch. 90, § 24(1)(g). But, as we pointed out in our prior opinion, such hearings are likely to be delayed with the consequence that the license remains suspended for a period of time without there being any available procedure for seeking emergency relief. Opinion 429 F.Supp. at 397, n. 11 and

400.[2] Unlike the situation in *Love*, Massachusetts provides no opportunity for emergency relief prior to a hearing. Hence the potential for irreparable personal and economic hardship is far greater in Massachusetts than in Illinois.

[2]In his dissenting opinion Judge Campbell states that . . . "Massachusetts provides for a full hearing commencing, though not necessarily ending, the very same day the license is surrendered." The fact is that hearings are rarely, if ever, held on the day the license is surrendered. Both parties acknowledged at oral argument that any factual dispute would make it impossible to hold an immediate hearing. The only matter reviewable on the day of surrender would be whether there was somthing defective on the face of the report of refusal form. Factual disputes, such as those underlying the instant case, would require the hearing to be postponed for some unpredictable period until the police and other witnesses would be available.

If a Massachusetts licensee were at least given a "same day" opportunity to make a pre-hearing request for emergency relief, the existing constitutional defect would be cured. No evidence would need to be taken at this "same day" hearing. All that need be provided would be an opportunity to alert the registrar to facts which might cause him, in his discretion, to hold up suspension until an evidentiary hearing could be held. Under the existing statutory scheme he has no such discretion.

Indeed, such an approach would be consistent with Judge Campbell's comments at hearing.

"It seems to me if you provided that the Registrar send a letter out to the fellow saying, 'I am going to take your license away if you refuse. If you want a hearing on this, you will have to ask for one in the next five days. Otherwise, your license is suspended.' I would think in most instances where there was no real dispute about it *that would give someone an opportunity, if he had a situation like this plaintiff, to bring it to the attention of the Registrar.*" (Emphasis supplied.) Transcript p. 30.

"Well, my feeling would be that at the time this hearing is held, where the fellow has turned in his license, the hearing officer might hold up the suspension until the witnesses came in. If a different story is told then, then the Registrar might say, 'all right. Hold up the suspension for ten days until I get to the bottom of this.'" Transcript p. 39.

We feel that these comments of Judge Campbell are right on the mark and, if adopted by the Commonwealth, would provide those in the position of the plaintiff with a constitutionally adequate procedure for seeking relief.

[1] Contrary to the interpretation advanced by the defendant, our prior opinion does not require that the Registrar provide opportunity for a pre-suspension evidentiary hearing. Rather, we required that some opportunity to be heard be provided a licensee prior to suspension. The opportunity need not be a formal hearing, but must at a minimum give the licensee a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust. As *Love* recognized, Illinois has made special provision for hardship situations. The lack of such opportunity in Massachusetts is critical.

[2] *Second*, the risk of error under the Illinois scheme is markedly less than under the Massachusetts procedure. The revocation decision in Illinois is based on a series of criminal convictions. As Justice Blackmun pointed out, the licensee "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based." 431 U.S. at 113, 97 S.Ct. at 1728. To be sure, there is some risk of human error in Illinois' reliance on criminal record keeping. Yet that risk is insignificant. In contrast, under the Massachusetts procedure, the Registrar's decision is based solely on a form affidavit which the licensee has no opportunity to rebut. The licensee does not have an opportunity to be heard with regard to any of the three factual findings required to be made as a basis for the revocation of his license.[3]

According to the concurring opinion of Justice Stevens, the Supreme Court was not rejecting the constitutional

[3]As we pointed out in our original opinion, the arresting officer must attest to three matters: that the licensee was arrested; that the officer had reasonable grounds for believing that the person had been operating a motor vehicle while under the influence of intoxicating liquor; and that the person refused to submit to a breathalyzer test after being informed that his license would be suspended as a result of such a refusal. Opinion 429 F.Supp. at 394, n. 1.

analysis of the District Court in *Love*. His opinion indicates that an ex parte suspension or revocation of a license, based on subjective factors, may not be constitutionally permissible. The inference seems to be that summary action is constitutionally permissible only when it is based on facts that are objectively ascertainable. We respectfully disagree with our brother that the three issues which must be set forth in the police officer's affidavit amount to "a simple, objectively-ascertainable event: i.e., a refusal to take a chemical or breath test. . . ." The facts of this case demonstrate that the contrary is true. Here, plaintiff claims he was willing to take the breath test but the opportunity to do so was denied him. The findings of the state judge support his contention. "Breathalyzer refused when requested within one half hour of being at the police station. See attached affidavit and memorandum. Smith." The action was dismissed. Transcript at p. 5. Judge Campbell's query as to whether plaintiff's conduct at the police station "qualifies as a refusal" ignores the state court's finding that the plaintiff was refused the opportunity to take the test, not the other way around. The licensee in Massachusetts is not only presumed to be in violation of the statute, but is required to suffer the adverse consequences of such presumed violation without any opportunity to be heard.[4] The challenged Massachusetts procedure is simply not comparable to that approved in *Love*.

Finally, nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the

[4]Moreover, we cannot agree with Judge Campbell's conclusion that . . . "it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest. . . ." The negative inference he draws is a little too close to that too often drawn by lay persons willing to assume that one who relies on Fifth Amendment rights must be guilty of something.

highway. Regardless of the challenged statute, a positive breathalyzer test does not automatically remove the chronic drunk driver from the road. He may continue to drive until he is duly convicted.[5] Indeed, in the Registrar's discretion, a conviction of drunk driving need not lead to license revocation. Providing an opportunity to be heard prior to automatic suspension for refusal to take a breathalyzer test — the sole effect of our opinion — does not offend the state interest in safe highways. We conclude that our evaluation, of the Governmental interest at stake here, 429 F.Supp. at 399-400, is unaffected by *Love*.

Accordingly, the court declines to modify its judgment as a result of the opinion in *Love*. An order will issue.

LEVIN H. CAMPBELL, Circuit Judge (dissenting).

I disagree with my colleagues' judgment that this case is substantially distinguishable from *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). In that case the Court upheld the Illinois Driver Licensing Law which, under "point system" regulations adopted in Illinois by the Secretary of State, called for immediate suspension without prior hearing of the licenses of those whose licenses had already been suspended for moving vehicle violations on three occasions within ten years. In the present case we are confronted with a Massachusetts law which, in order to compel those arrested for drunken driving to take an im-

[5]In contrast to the Illinois statute, the Massachusetts statute does not directly enhance highway safety. The Illinois statutory provision which was upheld in *Love* was designed to remove drivers from the road who had been repeatedly *convicted* for traffic offenses. 431 U.S. 105, 97 S.Ct. 1723. Under the Massachusetts statutory scheme, summary license suspension is not based on any judicial determination of a driver's danger to the public. Rather, as noted above, it occurs solely because the motorist, whether drunk or sober, refuses to take a chemical test.

mediate chemical or breath test, penalizes the refusal to take such a test by a 90-day license suspension. Like the Illinois law, the Massachusetts law calls for a suspension only upon the occurrence of a simple, objectively-ascertainable event: i.e., a refusal to take a chemical or breath test, as certified to under penalties of perjury by the officer witnessing the refusal. And, going beyond any safeguards in the Illinois law, Massachusetts provides for a full hearing commencing, though not necessarily ending, the very same day the license is surrendered.[1]

[1]My brothers, while agreeing that there is provision for an immediate hearing with counsel at the time of the license surrender (*see* Note 11 of the court's opinion written by Judge Freedman and concurred in by Judge Tauro), now assert that "hearings are rarely if ever held on the day the license is surrendered". They apparently base this assertion on the fact that if testimony has to be taken, the hearing will be continued until the presence of necessary witnesses, such as the police officers, can be secured. But postponing the evidentiary part of the hearing does not alter the fact that a non-evidentiary hearing, with counsel, is available to the licensee on the same day the license is surrendered. (*See* Note 11 of my brothers' main opinion, which the transcript fully supports.) As Mr. Hagopian, plaintiff's attorney stated, "If you walk into the Registry down there with your license and give it to the Registrar, you get a hearing right away." (Tr. 11.) "[A]s I understand the statutory procedure, under § (g) you can get an immediate hearing before the Registrar." (Tr. 14.) Mr. Hagopian's objection to this procedure (besides the fact that it comes, in his view, too late) is that so much of the hearing as is available on the day the license is surrendered is non-evidentiary. He argues, "You are not going to get your license back that day if you contest the factual issues unless there is something defective upon the face of the affidavit or report of refusal form." Still, the opportunity to appear before the Registrar's delegate with counsel is nonetheless a "hearing", albeit a non-evidentiary one, affording the license holder an opportunity to point out errors to the Registrar which do not require the taking of evidence to resolve. And while there is no evidence as to when in time the opportunity to present testimony in the continued proceeding may normally be expected, there is no reason to assume that this will not occur with reasonable expedition, depending upon the availability of witnesses, the schedule of the hearing officer, and the usual considerations that affect the holding of hearings of this nature.

It was stipulated[1a] that of 884 traffic fatalities in Massachusetts in 1975, 283 resulted from accidents in which alcohol was determined as the attributing cause. It was further stipulated that approximately 300 people were refusing to submit to breath analyses tests in Massachusetts every month. Given the state's compelling interest in lessening the carnage on its highways caused by intoxicated drivers, and given also the statute's minimal restrictions on personal liberties, I can see no basis whatever for declaring it unconstitutional. Under *Love* and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), I would vacate the injunction and dismiss the complaint.

My colleagues make much of the reference in *Love* to a special provision for hardship and for holders of commercial licenses.[2] Since plaintiff is not a commercial licensee the

[1a] Although plaintiff did not execute the stipulations as to facts, Mr. Hagopian stated, in response to my query as to whether there was an agreed statement of facts, "That is correct." (Tr. 3.)

[2]Under the Illinois law and regulation, commercial licensees are allowed 5 rather than 3 offenses before mandatory suspension. Eligibility for relief under that section is not automatic, but requires the commercial driver whose license "is suspended", *Dixon* v. *Love*, 431 U.S. 105, note 7, 97 S.Ct. 1723, 52 L.Ed. 2d 172 (1977), to establish eligibility after surrendering his license. Illinois law also allows any driver whose license is suspended or revoked to apply for a restricted hardship permit to drive between his residence and his place of employment or within other proper limits, but only at the end of a post-suspension review proceeding which occurs only "as early as practical" after the already suspended licensee has requested it. *Id.*; *see* Ill.Ann. Stat. ch. 95½, § 6-206(c)(3) (Smith-Hurd Supp. 1977). My colleagues are thus in my view mistaken in their statement, "Unlike the situation in *Dixon*, Massachusetts provides no opportunity for emergency relief prior to suspension." Massachusetts provides no such opportunity, but neither does Illinois.

latter is inapposite, but he would, in the Illinois scheme, once his license was suspended, be eligible, as under Massachusetts law he is not, to apply for a limited hardship permit.

There are two answers to this attempted distinction. First, Massachusetts, unlike Illinois,[3] affords a licensee a hearing commencing the very day he surrenders his license. To be sure, if witnesses are required, a continuance may be needed to bring in the material witnesses, but if the issue can be resolved without witnesses it can be disposed of the same day, and, if not, there is no reason to suppose that the taking of evidence will not proceed with reasonable dispatch. In Illinois, on the other hand, the licensee may have to wait for some time after suspension of his license for a hearing. His only opportunity is to apply after suspension for a hardship permit (the consideration and granting of which may, presumably, take some time). In Massachu-

[3]Under the Illinois plan, the suspended licensee was only entitled to a hearing "as early as practical" within 20 days after requesting one. In Massachusetts, by contrast, a hearing, with attorney present, is available commencing immediately (*see* note 1). At such a hearing, according to the stipulated facts, "the hearing officer examines the Report of Refusal to Submit to Chemical Test to determine that it is complete and complies with the requirements of Ch. 90 § 24(1)(f). If the Report is not complete or does not comply, the hearing officer returns the driver's license in hand to the licensee. If the Report is complete and complies, the burden is on the licensee to show that one of the factual issues set forth in Ch. 90 § 24(1)(g) was in the negative, i. e., there was no probable cause, no arrest, or no refusal to submit. The hearing officer will adjourn the hearing at his own request, or upon the request of the licensee, to permit the police officer or other witnesses to be brought in for questioning, or for counter affidavits to be submitted, or to allow the hearing officer to interview witnesses in the field.

"Witnesses at a hearing may be questioned by the hearing officer, or a licensee, or his attorney. From an adverse decision of the Registrar, a license may take an appeal to the Board of Appeals pursuant to G.L. Ch. 90 § 28."

setts, one gets a hearing commencing the same day the license is surrendered; and the features my brothers think most essential — i.e., alerting the Registrar to the possibility that suspension is unwarranted and would be unjust — can take place that very day and could, in the case of clerical or other obvious errors, result in return of the license then and there. (*See* Note 11, the court's opinion.) Thus to the extent the Illinois hardship provision is seen as adding to the suspended licensee's due process rights,[4] the opportunity in Massachusetts for a hearing commencing the same day that the license is surrendered seems to me not only a fully adequate counterpart but quite possibly an improvement.

The second reason for doubting that the Illinois hardship provision adequately distinguishes *Love* is that that provision, while cited, was but one of a number of factors discussed in *Love*, and hardly the most crucial. The Court pointed out that "a driver's license may not be so vital and essential as are social insurance payments [dealt with in *Eldridge*] on which the recipient may depend for his very subsistence". *Id.* (Under *Eldridge* a social security beneficiary may be deprived of benefits for as much as a year or more while hearings take place.) The Court went on to say, "Moreover, the risk of an erroneous deprivation in the absence of a prior hearing is not great." The same is true here. The only question is the existence or non-existence of a readily observable fact. One is hard put to think of a genuine factual or legal issue which would exist in the generality of cases. To be sure, the issue plaintiff asserts here, whether an initial refusal followed by a later request to take the test qualifies as a refusal, may be the rare exception. If an arrestee can wait until his blood or breath levels

[4]I take it there is no claim that the Constitution grants any substantive right to receive a hardship driver's permit notwithstanding a refusal to submit to a chemical or breath test.

show less alcohol, the usefulness of the test is diminished; on the other hand, the Registrar or state courts may find it unreasonable for the police not to accommodate a change of heart made in good faith with reasonable promptness. Once settled, however, such a matter of statutory interpretation would be nonrecurring; and it is difficult to imagine similar issues that are likely to arise in the administration of this utterly simple statute.

To be sure, a driver might assert that the police had required the test after arresting him without cause. But it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest; if improperly arrested, he would take the test and sue for false arrest, not put his license in jeopardy. And if the licensee feels that he is the victim of false police affidavits, he would be raising a claim to which the Illinois point system is equally vulnerable. If a police officer or bureaucrat is willing deliberately to commit perjury, the citizen's ultimate recourse must be under various state and federal tort and criminal statutes. In 999 cases out of 1,000 I cannot see what there will ever be to try concerning the fact of refusal to take a chemical or blood test. And conceding that, on a rare occasion, that one meritorious case will arise, the opportunity for immediate hearing which Massachusetts affords seems to me to go far to obviate hardship.[5] While such a rare case would

[5]The *Love* Court recognized the possibility of occasional clerical error but felt this did not outweigh the state's interest in summary procedures. Overall, the Illinois point scheme, of which *Love* upheld one small feature, is far more complicated than the very simple Massachusetts statute now before us, inviting more administrative errors. Plaintiff's claim here is not, of course, based on administrative error at all. It raises a question that plainly could not have been resolved in the simple, non-evidentiary type of presuspension hearing which is all my brothers say is constitutionally necessary before a suspension. Simple errors of the type my brothers' procedure might eliminate can be solved under the existing Massachusetts law either by informal communication between the driver and the police and/or registrar, or else at the non-evidentiary hearing available the same day the driver turns in his license.

likely involve disputed facts requiring the taking of evidence, and thus would involve surrender of the license in the interim, it does not seem unfair to require a licensee who, on the sworn affidavits of the officers has declined to take the test, to put up with that hardship. To strike the balance the other way — to permit people to litigate such an unlikely question while retaining their licenses — seems to me to impose an unfair added burden upon the society that ultimately pays both the costs of drunken driving and the salaries of the additional registry officials needed to administer a more elaborate system.

Finally, I have great difficulty with my brothers' confident assertion that "nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the highway." This may be their belief, but it clearly is not shared by the Massachusetts Legislature, the Registrar of Motor Vehicles, or the Attorney General, all of whom are charged, as the federal courts are not, with the primary duty to make this sort of judgment. As I argued in my earlier dissenting opinion, and as the *Love* Court has said,

> ". . . the substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case. Giving licensees the choice thus automatically to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full administrative hearings . . .." 431 U.S. at 114, 97 S.Ct. at 1728.

My brothers seek to avoid the implications of this statement by stating that they do not require nor view as consti-

tutionally necessary "a pre-suspension evidentiary hearing". They concur with plaintiff's counsel who, in final argument, made the statement "we do not insist upon a hearing — just notice and an opportunity to respond." Plaintiff forgets, however, that in arguing the inadequacy of the hearing which the Registry offers when a licensee surrenders his license, his principal argument was that the hearing when commenced was non-evidentiary, and hence incapable of immediately resolving the factual dispute which had arisen. I suggest that a non-evidentiary pre-suspension hearing would have been totally useless to plaintiff. His case can only be resolved in light of testimony, as he seemed to concede. *See* note 1 *supra*. Individuals such as plaintiff who wish to assert a factually disputed claim will gain nothing from a non-evidentiary hearing. All a non-evidentiary hearing prior to suspension would do is cure simple mix-ups. But this function is perfectly well accomplished by the non-evidentiary hearing which a licensee may obtain the day he surrenders his license. What Massachusetts now provides — the opportunity for a full hearing beginning the very day the driver hands in his license — seems to me to strike a reasonable balance between the individual's interests and those of the state.

It is worth focusing, moreover, on the problem faced by Massachusetts. It is dealing with a problem — arrested drivers refusing to take the test — which even under the challenged Massachusetts system arises in that state 300 times a month. Meaningful machinery to deal with the problem has to be capable of mass administration. Intoxicated drivers can often talk their way out of a drunken driving conviction, in court, if the police do not have in hand the results of a scientific test taken at the moment of arrest. To the extent drivers are afforded increased opportunities before suspension to delay and litigate any suspen-

sion, they will be encouraged to try their chances with a refusal. Even if finally required to forego the license (for 90 days) much time will have transpired, and the state will have had to expend time and money in what in virtually all instances will be useless administrative proceedings invoked simply to buy time or in the hope that something favorable will turn up.

I think that Massachusetts could rationally determine that the procedure in question was the most practical and effective one. The non-evidentiary pre-suspension hearing my brothers seem to require will add no measurable protection to the present system; if, on the other hand, they mean to require a hearing that will enable the Registrar to delay suspension until after investigation into contested facts, they are proposing something which will constitute a serious encumbrance. Since the present system is fundamentally fair, since it is devised to deal with a problem of compelling importance to the state, since it was adopted by the people (most of whom drive) through their legislators (most of whom drive), and since the potential for hardship to an innocent person seems altogether minimal in comparison with the interests served, I think the Massachusetts law should be sustained. While there are inconsequential differences between it and the Illinois system at issue in *Love*, the principles in *Love* seem to me dispositive.

I would allow the motion for reconsideration, vacate the injunction, and dismiss the complaint.

77-69

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

ROBERT A. PANORA, Registrar of Motor Vehicles of the Commonwealth of Massachusetts,
Appellant,

v.

DONALD E. MONTRYM, et al.,
Appellees,

On Appeal From the United States District Court for the District of Massachusetts

MOTION TO AFFIRM

Robert W. Hagopian, Esq.
c/o Orion Research, Inc.
380 Putnam Avenue
Cambridge, Massachusetts
(617) 864-5400

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MOTION TO AFFIRM

Now come Donald E. Montrym and all members of the class certified by the district court and move this Court to affirm the judgment of the three-judge district court entered on May 4, 1977[1] for the reasons set forth below.

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1. See Appellant's Jurisdictional Statement pp. 24a and 25a.

STATUTES INVOLVED

Although G.L. Ch. 90 §24(10(f) was the state statute declared unconstitutional by the district court, a proper understanding of the legal issues in this case cannot be resolved without consideration of the companion §24(1)(g) which reads:

> Any person whose license, permit or right to operate has been suspended under paragraph (f) shall be entitled to a hearing before the registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access or upon any ways or in any place to which members of the public have a right of access as invitees or licensees; (2) was such person placed under arrest, and (3) did such person refuse to submit to such

test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate.

QUESTIONS PRESENTED

A more complete statement of the question presented by this appeal would be as follows:

Where the Registrar of Motor Vehicles affords a "prompt" post-suspension hearing, must he provide some "opportunity to respond" prior to his revoking, on the basis of police affidavits, a licensee's right to drive for failure to take the breathalyzer test pursuant to G.L. Ch. 90 §24(1)(f) and (g)?

STATEMENT OF THE CASE

The Registrar's statement of the case is deficient in a multitude of facts which are necessary to judge the issues which he raises. A more complete version is set forth by the district court in its opinion set out in Appendix A, pps. 3a-6a to appellant's jurisdictional statement.

ARGUMENT

No question exists concerning the importance and impact of the decision below, not only in Massachusetts, but in the other state jurisdictions having "implied consent" statutes similar to G.L. Ch. 90 §24(1)(f) and (g). Undoubtedly, and as a result of this decision, the issue is being litigated in other jurisdictions. The effect of the decision, and, in particular the injunction issued by the three-judge court, was to knock out the "breathalyzer test". Additionally, the Registrar was forced pursuant to a contempt proceeding to return approximately one thousand motor vehicle licenses to alleged drunk drivers.

As the Registrar observes,[2] the issue presented has sharply divided state and federal courts. All of the highest state courts that have viewed the problem have sustained the prior consent laws and their attendant summary revocation procedures from constitutional attack. Of the state cases

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2. See Appellant's Jurisdictional Statement pp. 10-11.

cited in his footnotes 6 and 8, the Registrar should have included Craig v. Commonwealth of Kentucky, 471 SW 2d 11 (1971) and Robertson v. Oklahoma, 501 P 2d 1099 (1972)[3]. Of all the state court decisions, there has been only one dissent. See Judge Osborn's opinion in Craig v. Commonwealth of Kentucky, supra, at p. 15. On the other hand, every federal court that has reviewed the state statutes, has struck them down as violating the due process clause. Besides the instant case, see Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 C.E.D. Ky. (1974); Chavez v. Campbell, 397 F. Supp. 1285 (D. Ariz. 1973); and Holland v. Parker,

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3. Although Ballou v. Kelley, 176 N.Y.S. 2d 1005 (1958) and Campbell v. Superior Court, 106 Ariz. 542 (1971) upheld statutes similar to the one in issue, these decisions were prior to Bell v. Burson, 402 U.S. 535 (1971). Likewise, the Registrar's reliance on Glass v. Commonwealth, 460 PA 362 (1975) and Harrison v. State Dept. of Public Safety, 298 So. 2d 312 (1974) is equally misplaced.

354 F. Supp. 196 (1973). Of all the ten federal Jduges that passed on the issue, only one, Judge Campbell in the instant case, has dissented.[4]

The decisions of the highest state courts manifest state institutional interests, and the decisions of the lower federal courts manifests the federal interest in the protection of federal rights. In terms of logic, the state decisions are barren, excepting a false precipice based upon the emergency doctrine. Only Craig v. Commonwealth of Kentucky, supra,[5] touches

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4. Judge Campbell was a Massachusetts legislator, assistant attorney general, and superior court judge, prior to his appointment as a federal judge.

5. "Balancing the public interest with the entitlement of the individual to operate a motor vehicle and in light of the requirement for an accelerated determination of the claimed violation, we hold that the procedure provided in KRS 186.565 is a valid exercise of the police power" - Craig v. Commonwealth of Kentucky, supra, at. p.5.

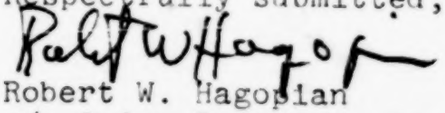
the point pressed by the Registrar. On the other hand, the Federal decisions reflect the logical application of Bell v. Burson, 402 U.S. 535 (1971), and the succeeding companion cases of this Court. The decisions in Slone, Chavez, Holland and the instant case speak for themselves and not much can be added to their well reasoned and thorough opinions.

Some comment of Judge Campbell's dissenting opinion is appropriate. He would cast aside as irrelevant Mr. Montrym's claim of innocence. He would ajudge Mr. Montrym guilty on the basis of police form affidavits and sustain such a procedure on the grounds that the Registrar gives a deprived licensee a prompt opportunity thereafter to prove himself innocent. Further, Judge Campbell would give credence to the Massachusetts Legislature's judgment that the trial by affidavit procedure is necessary to coerce motorists to take the breathalyzer test. With all due respect, Mr. Montrym traverses Judge Campbell's thesis that the threat and imposition of instant punishment is necessary to enforce

obedience to state laws.[6] Indeed, if there is any reason why this Court should give plenary consideration to this matter, it should be that Judge Campbell's dissent should not remain unanswered.

To conclude, Mr. Montrym's position is that the federal decisions deciding this issue are correct, and he asks this Court to support those judges who have had the courage and conviction to strike down these unconstitutional statutes fully realizing the impact of their decisions.

Respectfully submitted,



Robert W. Hagopian
c/o Orion Research, Inc.
380 Putnam Avenue
Cambridge, Massachusetts
(617) 864-5400

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6. Nowhere does Judge Campbell or any of the state court decision explain why a hearing cannot be provided prior to suspension. Compare Harrison v. State Dept. of Public Safety, 296 Minn. 238, 207 NW 2d 541 (1973).

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-69

ROBERT A. PANORA, Registrar of
Motor Vehicles of the Commonwealth
of Massachusetts,
Appellant,

V.

DONALD E. MONTRYM, et al.,
Appellees.

On Appeal From the United States
District Court for the District
of Massachusetts

MOTION TO VACATE JUDGMENT

Robert W. Hagopian, Esq.
c/ Orion Research Incorporated
380 Putnam Avenue
Cambridge, Massachusetts 02139
(617) 864-5400

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IN THE
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v.

DONALD E. MONTRYM, et al.,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts

MOTION TO VACATE JUDGMENT

Now comes Donald E. Montrym and the members of the plaintiff class certified by the three-judge court below, and move this Court, for the reasons set forth below, to vacate FORTHWITH the judgment entered on October 31, 1977.

ARGUMENT

On May 6, 1977, the three-judge court below entered a final judgment declaring Massachusetts General Laws Ch. 90 §24(1)(f) unconstitutional and permanently enjoining the Registrar of Motor Vehicles from suspending any driver's licenses pursuant to this provision.

On July 12, 1977, the Registrar of Motor Vehicles filed an appeal pursuant to 28 U.S.C. 1253 in this Court from the May 6, 1977 judgment of the three-judge district court. In his jurisdictional statement, the Registrar noted on page 12 ftn. 9 that he had moved the district court to stay and modify its May 6, 1977 judgment in light of Dixon v. Love, 431 U.S. 105 (1977) which was decided by this Court on May 16, 1977. Pursuant to the Registrar's motion, the three-judge district court denied a further stay and issued a further order affirming its judgment of May 6, 1977. The three-judge court order was accompanied by an extensive opinion dealing with Dixon v. Love, 431 U.S. 105 (1977), and included a dissenting opinion by Judge Campbell who previously dissented from the May 6, 1977

judgment. The three-judge court's further order and opinion were handed down on October 6, 1977 and copies are attached hereto as Appendix A.

On October 7, 1977, the undersigned attorney forwarded ten copies of the district court's order and opinion to the clerk of this Court together with a request that the clerk bring this matter to the Court's attention as the Registrar's appeal was pending before the Court. This counsel's letter was received by the clerk's office and a copy is attached hereto as APPENDIX B.[1] On October 14, 1977, the clerk of this Court returned the ten copies of the district court's order and opinion, apparently not recognizing its significance. Additionally, the clerk forwarded a copy of his letter to

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1 Although a copy of this letter was mailed to Assistant Attorney Generals Sikora and Rosenfeld, Assistant Attorney General Sikora advised this counsel on November 1, 1977 by telephone that he did not receive a copy of it. However, on November 9, 1977, he advised this counsel that he had in fact received it.

the Registrar's counsel of record.[2] A copy of the letter is attached hereto as APPENDIX C. This counsel, however, did not receive the clerk's letter until October 25, 1977 as he was in Europe on legal business. Upon his return, he promptly replied to the letter, a copy of his reply being attached hereto as APPENDIX D.

To this date, and notwithstanding Rule 15(1)(a), (h), and (i), the Registrar has never brought the district court's October 6, 1977 order and opinion to this Court's attention, nor has he moved this Court to stay the district court order. In light of this and in light of the district court's order and opinion reaffirming its original decision notwithstanding Dixon v. Love, 431 U.S. 577, Montrym moves this Court to vacate its October 31, 1977 judgment FORTHWITH so that the injunction issued by the three-

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2 Assistant Attorney General Sikora has advised this counsel on November 9, 1977 that he never received a copy of Michael Rodak's October 4, 1977 letter and was unaware of its contents until October 26, 1977.

judge court on May 6, 1977 will remain in effect until this Court has time to consider the October 6, 1977 opinion by the District Court.

Respectfully submitted,

Robert W. Hagopian

CERTIFICATE OF COUNSEL
PURSUANT TO RULE 58(1)

Now comes Robert W. Hagopian pursuant to Rule 58(1) who deposes and says that he is a member of the bar of this Court, that the facts set forth in Donald E. Montrym's motion to vacate are true and of his own knowledge, and further, that this motion is presented in good faith and not for delay.

Signed under the pains and penalties of perjury.

Robert W. Hagopian

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DONALD E. MONTRYM,
individually and in
behalf of all others
similarly situated,

V. CA 76-2560-F

ROBERT A. PANORA,
Registrar of Motor
Vehicles, and his
successors in office

ORDER

TAURO, D.J. October 6, 1977

In accordance with the memorandum issued today, the court ORDERS that the defendant's motion for reconsideration of its previous motions to stay judgment and to modify judgment is denied. The court further ORDERS that the judgment in favor of the plaintiff entered on May 4, 1977 remain in effect.

United States District
Judge

United States District
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DONALD E. MONTRYM,
individually and on
behalf of all others
similarly situated

V. CA 76-2560-F

ROBERT A. PANORA,
Registrar of Motor
Vehibles, and his
successors in office

MEMORANDUM

Tauro, D. J. Ocotber 6, 1977

Defendant Registrar of Motor Vehicles has moved this court to reconsider its denial of his earlier motions to stay or modify the judgment entered against him by this court on May 4, 1977 in accordance with the opinion issued on March 25, 1977. He relies primarily upon the recent Supreme Court case of Dixon v. Love, 45 U.S.L.W. 4447 (U.S. May 16, 1977). In that case, the Court upheld the provision of the Illinois Driver Licensing Law which

empowers the Secretary of State to suspend or revoke, without a preliminary hearing, a license of a driver who had repeatedly been convicted for traffic offenses.

The plaintiff argues, and this court agrees, that several critical factors distinguish Love from this case. The significance of these distinguishing factors becomes apparent when they are analyzed in terms of the three prong test of Matthews v. Eldridge, 424 U.S. 319 (1976) which requires consideration of:

> first, the private interest that will be affected by the official action; second, the risk of an erroneaous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

First, the private interest here is greater than that at stake in Love. There, the Court emphasized that the challenged Illinois statute allowed a person, upon notification of suspension or revocation, to request emergency relief in the form of a restricted permit. Ill. Ann. Stat. c. 95 1/2 §§ 6-206(c)3 and (c)2. The opportunity for such relief was a controlling factor in the Court's decision.

> The private interest affected by the decision here is the granted license to operate a motor vehicle. Unlike the social security recipients in Eldridge, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. See Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The Illinois statute includes special provisions for hardship and for holders of commercial

licenses, who are those most likely to be affected by the deprival of driving privileges. See n. 7, supra. We therefore conclude that the nature of the private interest here is not so great as to require us "to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." Mathews v. Eldridge, 424 U.S., at 343. See Arnett v. Kennedy, 416 U.S. 134 (1974).

45 U.S.L.W. at 4449.

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1 Under the Illinois scheme, a commerical driver whose license has been suspended may submit an affidavit setting forth the facts of his employment and the number of offenses committed while driving a commercial vehicle. Upon receipt of the affidavit and the driver's license, the Secretary shall "thereupon send to said driver a permit to drive a commercial vehicle in his regular occupation." Alternatively, the commerical driver may seek a hearing. Ill. Ann. Stat. c. 95 1/2 §6-206(c)2. Consequently, the potential for commercial loss is considerably less

There is no comparable safeguard in the challenged Massachusetts statute. See Mass. Gen. Laws ch. 90, §24(1)(f).

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footnote 1 cont.

than in Massachusetts.

The statutory scheme for the granting of hardship permits is somewhat more ambiguous. It is not clear whether the Secretary may consider and grant a limited license to prevent undue hardship prior to the hearing permitted by Ill. Ann. Stat. c. 95 1/2 §2-118, or only subsequent to such a hearing. §6-206(c)3. While our dissenting brother believes that the hardship application may be made and considered only subsequent to hearing, the Court's opinion in Dixon, supra, suggests that the hardship application may be considered prior to hearing. 45 U.S.L.W. at 4448-9.

In view of the issue before the Supreme Court in Love, it is logical to conclude that consideration of what occurs after the post evidentiary hearing (under Ill. Ann. Stat. c. 86 1/2 §2-118) would be irrelevant. Yet the Supreme Court explicitly referred to the special provisions for holders of commercial licenses and for hardship cases, as indicated in the passage quoted above in the text, when it enu-

We recognize that there is a statutory provision for a hearing at the time of the license surrender. Mass. Gen. Laws ch. 90 §24(1)(g). But, as we pointed out in our prior opinion, such hearings are likely to be delayed with the consequence that the license remains suspended for a period of time without there being any available procedure for seeking emergency relief. Opinion at 9, n. 11 and 14.[2] Unlike the situation in Love, Massachusetts provides no opportunity for emergency relief prior to a hearing. Hence the potential for

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footnote 1 cont.

merated those factors which led the Court to conclude that the nature of the right involved in Love did not require an evidentiary hearing prior to license suspension or revocation.

Judge Campbell's references to stipulated facts in footnote 3 and throughout his dissenting opinion are troublesome. Our understanding is that defendant's proposed stipulation of fact was not executed by the plaintiff.

2 In his dissenting opinion Judge Campbell states that ... "Massachusetts provides for a full hearing commencing, though not necessarily ending, the very same day the license is surrendered." The fact is that hearings

irreparable personal and economic hardship is far greater in Massachusetts than in Illinois.

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footnote 2 cont.

are rarely, if ever, held on the day the license is surrendered. Both parties acknowledged at oral argument that any factual dispute would make it impossible to hold an immediate hearing. The only matter reviewable on the day of surrender would be whether there was something defective on the face of the report of refusal form. Factual disputes, such as those underlying the instant case, would require the hearing to be postponed for some unpredictable period until the police and other witnesses would be available.

If a Massachusetts licensee were at least given a "same day" opportunity to make a pre-hearing request for emergency relief, the existing constitutional defect would be cured. No evidence would need to be taken at this "same day" hearing. All that need be provided would be an opportunity to alert the registrar to facts which might cause him, in his discretion, to hold up suspension until an evidentiary hearing could be held. Under the existing statutory scheme he has no such discretion.

Contrary to the interpretation advanced by the defendant, our prior opinion does not require that the

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footnote 2 cont.

Indeed, such an approach would be consistent with Judge Campbell's comments at hearing.

"It seems to me if you provided that the Registrar send a letter out to the fellow saying, 'I am going to take your license away if you refuse. If you want a hearing on this, you will have to ask for one in the next five days. Otherwise, your license is suspended.' I would think in most instances where there was no real dispute about it that would give someone an opportunity, if he had a situation like this plaintiff, to bring it to the attention of the Registrar." (emphasis added). Transcript p. 30.

"Well, my feeling would be that at the time this hearing is held, where the fellow has turned in his license, the hearing officer might hold up the suspension until the witnesses came in. If a different story is told then, then the Registrar might say, 'all right.' Hold up the suspension for ten days until I get to the bottom of this." Transcript p. 39.

Registrar provide opportunity for a pre-suspension evidentiary hearing. Rather, we required that some opportuinty to be heard be provided a licensee prior to suspension. The opportunity need not be a formal hearing, but must at a minimum give the licensee a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust. As Love recognized, Illinois has made special provision for hardship situations. The lack of such opportunity in Massachusetts is critical.

Second, the risk of error under the Illinois scheme is markedly less than under the Massachusetts procedure. The revocation decision in Illinois is based on a series of criminal convictions. As Justice Blackmun pointed out, the licensee "had the opportunity for a full judicial hearing in connection with each

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footnote 2 cont.

We feel that these comments of Judge Campbell are right on the mark and, if adopted by the Commonwealth, would provide those in the position of the plaintiff with a constitutionally adequate procedure for seeking relief.

of the traffic convictions on which the Secretary's decision was based." 45 U.S.L.W. at 4449. To be sure, there is some risk of human error in Illinois' reliance on criminal record keeping. Yet that risk is insignificant. In contract, under the Massachusetts procedure, the Registrar's decision is based solely on a form affidavit which the licensee has no opportunity to rebut. The licensee does not have an opportunity to be heard with regard to any of the three factual findings required to be made as a basis for the revocation of his license.[3]

Accordingly, to the concurring opinion of Justice Stevens, the Supreme Court was not rejecting the constitu-

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3 As we pointed out in our original opinion, the arresting officer must attest to three matters: that the licensee was arrested; that the officer had reasonable grounds for believing that the person had been operating a motor vehicle while under the influence of intoxicating liquor; and that the person refused to submit to a breathalyzer test after being informed that his license would be suspended as a result of such a refusal. Opinion at 1, n. 1.

tional analysis of the District Court in Love. His opinion indicates that an ex parte suspension or revocation of a license, based on subjective factors, may not be constitutionally permissible. The inference seems to be that summary action is constitutionally permissible only when it is based on facts that are objectively ascertainable. We respectfully disagree with our brother that the three issues which must be set forth in the police officer's affidavit amount to "a simple, objectively-ascertainable event" i.e., a refusal to take a chemical or breath test ..." The facts of this case demonstrate that the contrary is true. Here, plaintiff claims he was willing to take the breath test but the opportunity to do so was denied him. The findings of the state judge support his contention. "Breathalyzer refused when requested within one half hour of being at the police station. See attached affidavit and memorandum. Smith." The action was dismissed. Transcript at p. 5. Judge Campbell's query as to whether plaintiff's conduct at the police station "qualifies as a refusal" ignores the state court's finding that the plaintiff was refused the opportunity to take the test, not the other way around. The licensee in Massachusetts is not only presumed to be in violation of the statute, but is required to suffer the adverse consequences of such presumed violation without any opportunity to be

heard.[4] The challenged Massachusetts procedure is simply not comparable to that approved in Love.

Finally, nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the highway. Regardless of the challenged statute, a positive breathalyzer test does not automatically remove the chronic drunk driver from the road. He may continue to drive until he is duly convicted.[5] Indeed, in the Registrar's

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4 Moreover, we cannot agree with Judge Campbell's conclusion that . . . "it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest. . . ." The negative inference he draws is a little too close to that too often drawn by lay persons willing to assume that one who relies on Fifth Amendment rights must be guilty of something.

5 In contrast to the Illinois statute, the Massachusetts statute does not directly enhance highway safety. The Illinois statutory provison which was upheld in Love was designed to remove drivers from the road who had been repeatedly convicted for traffic offenses. 45 U.S.L.W. at 4448, 4450. Under the Massachusetts

discretion, a conviction of drunk driving need not lead to license revocation. Providing an opportunity to be heard prior to automatic suspension for refusal to take a breathalyzer test -- the sole effect of our opinion -- does not offend the state interest in safe highways. We conclude that our evaluation, Opinion at 12-14, of the Governmental interest at stake here is unaffected by Love.

Accordingly, the court declines to modify its judgment as a result of the opinion in Love. An order will issue.

United States District
Judge

United States District
Judge

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footnote 5 cont.

statutory scheme, summary license suspension is not based on any judicial determination of a driver's danger to the public. Rather, as noted above, it occurs solely because the motorist, whether drunk or sober, refuses to take a chemical test.

CAMPBELL, Circuit Judge (dissenting). I disagree with my colleagues' judgment that this case is substantially distinguishable from Dixon v. Love, 45 U.S.L.W. 4447 (U.S. May 16, 1977). In that case the Court upheld the Illinois Driver Licensing Law which, under "point system" regulations adopted in Illinois by the Secretary of State, called for immediate suspension without prior hearing of the licenses of those whose licenses had already been suspended for moving vehicle violations on three occasions within ten years. In the present case we are confronted with a Massachusetts law which, in order to compel those arrested for drunken driving to take an immediate chemical or breath test, penalizes the refusal to take such a test by a 90-day license suspension. Like the Illinois law, the Massachusetts law calls for a suspension only upon the occurrence of a simple, objectively-ascertainable event: i.e. a refusal to take a chemical or breath test, as certified to under penalties of perjury by the officer witnessing the refusal. And, going beyond any safeguards in the Illinois law, Massachusetts provides for a full hearing commencing, though not necessarily ending, the very same day the license is sur-

rendered.[1]

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1 My brothers while agreeing that there is provision for an immediate hearing with counsel at the time of the license surrender (see Note 11 of the court's opinion written by Judge Freedman and concurred in by Judge Tauro), now assert that "hearings are rarely if ever held on the day the license is surrendered." They apparently base this assertion on the fact that if testimony has to be taken, the hearing will be continued until the presence of necessary witnesses, such as the police officers, can be secured. But postponing the evidentiary part of the hearing does not alter the fact that a non-evidentiary hearing, with counsel, is available to the licensee on the same day the license is surrendered. (See Note 11 of my brothers' main opinion, which the transcript fully supports.) As Mr. Hagopian, plaintiff's attorney stated, "If you walk into the Registry down there with your license and give it to the Registrar, you get a hearing right away." (Tr. 11) "[A]s I understand the statutory procedure, under §(g) you can get an immediate hearing before the Registrar." (Tr. 14) Mr. Hagopian's objection to this procedure (besides the fact that it comes, in his view, too late) is that so much of the hearing as is available on the day the license is surrendered is non-evidentiary. He argues, "You are not going to get your license back that day if you

It was stipulated[1a] that of 884 traffic fatalites in Massachusetts in 1975, 283 resulted from accidents in which alcohol was determined as the attributing cause. It was further stipulated that approximately 300 people were refusing to submit to breath

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footnote 1 cont.

contest the factual issues unless there is something defective upon the face of the affidavit or report of refusal form." Still, the opportunity to appear before the Registrar's delegate with counsel is nonetheless a "hearing", albeit a non-evidentiary one, affording the license holder an opportunity to point out errors to the Registrar which do not require the taking of evidence to resolve. And while there is no evidence as to when in time the opportunity to present testimony in the continued proceeding may normally be expected, there is no reason to assume that this will not occur with reasonable expedition, depending upon the availability of witnesses, the schedule of the hearing officer, and the usual considerations that affect the holding of hearings of this nature.

1a. Although plaintiff did not execute the stipulations as to facts, Mr. Hagopian stated, in response to my query as to whether there was an agreed statement of facts, "That is correct." (Tr. 3)

analyses tests in Massachusetts every month. Given the state's compelling interest in lessening the carnage on its highways caused by intoxicated drivers, and given also the statute's minimal restrictions on personal liberties, I can see no basis whatever for declaring it unconstitutional. Under Love and Mathews v. Eldridge, 424 U.S. 319 (1976), I would vacate the injunction and dismiss the complaint.

My colleagues make much of the reference in Love to a special provision for hardship and for holders of commercial licenses.[2] Since plaintiff is

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2. Under the Illinois law and regulation, commercial licensees are allowed 5 rather than 3 offenses before mandatory suspension. Eligibility for relief under that section is not automatic, but requires the commercial driver whose license "is suspended", Dixon v. Love, 45 U.S.L.W. 4447, not 7 (U.S. May 16, 1977), to establish eligibility after surrendering his license. Illinois law also allows any driver whose license is suspended or revoked to apply for a restricted hardship permit to drive between his residence and his place of employment or within other proper limits, but only at the end of a post-suspension review

not a commercial licensee the latter is inapposite, but he would, in the Illinois scheme, once his license was suspended, be eligible, as under Massachusetts law he is not, to apply for a limited hardship permit.

There are two answers to this attempted distinction. First, Massachusetts, unlike Illinois[3], affords a

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footnote 2 cont.

proceeding which occurs only "as early as practical" after the already suspended licensee has requested it. Id.; see Ill. Ann. Stat. ch. 95 1/2, §6-206(c)(3) (Smith-Hurd Supp. 1977). My colleagues are thus in my view mistaken in their statement, "Unlike the situation in Dixon, Massachusetts provides no opportunity for emergency relief prior to suspension." Massachusetts provides no such opportunity, but neither does Illinois.

3. Under the Illinois plan, the suspended licensee was only entitled to a hearing "as early as practical" within 20 days after requesting one. In Massachusetts, by contrast, a hearing, with attorney present, is available commencing immediately (see note 1). At such a hearing, according to the stipu-

licensee a hearing commencing the very day he surrenders his license. To be sure, if witnesses are required, a

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footnote 3 cont.

lated facts, "the hearing officer examines the Report of Refusal to Submit to Chemical Test to determine that it is complete and complies with the requirements of Ch. 90 §24(1)(f). If the Report is not complete or does not comply, the hearing officer returns the driver's license in hand to the licensee. If the Report is complete and complies, the burden is on the licensee to show that one of the factual issues set forth in Ch. 90 §24(1)(g) was in the negative, i.e., there was no probable cause, no arrest, or no refusal to submit. The hearing officer will adjourn the hearing at his own request, or upon the request of the licensee, to permit the police officers or other witnesses to be brought in for questioning, or for counter affidavits to be submitted, or to allow the hearing officer to interview witnesses in the field.

"Witnesses at a hearing may be questioned by the hearing officer, or a licensee, or his attorney. From an adverse decision of the Registrar, a licensee may take an appeal to the Board of Appeals pursuant to G.L. Ch. 90 §28."

continuance may be needed to bring in the material witnesses, but if the issue can be resolved without witnesses it can be disposed of the same day, and, if not, there is no reason to suppose that the taking of evidence will not proceed with reasonable dispatch. In Illinois, on the other hand, the licensee may have to wait for some time after suspension of his license for a hearing. His only opportunity is to apply after suspension for a hardship permit (the consideration and granting of which may, presumably, take some time). In Massachusetts, one gets a hearing commencing the same day the license is surrendered; and the features my brothers think most essential -- i.e. alerting the Registrar to the possibility that suspension is unwarranted and would be unjust -- can take place that very day and could, in the case of clerical or other obvious errors, result in return of the license then and there. (See Note 11, the court's opinion.) Thus to the extent the Illinois hardship provision is seen as adding to the suspended licensee's due process rights,[4] the opportunity in

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4. I take it there is no claim that the Constitution grants any substantive right to receive a hardship driver's permit notwithstanding a refusal to submit to a chemical or breath test.

Massachusetts for a hearing commencing the same day that the license is surrendered seems to me not only a fully adequate counterpart but quite possibly an improvement.

The second reason for doubting that the Illinois hardship provision adequately distinguishes Love is that that provision, while cited, was but one of a number of factors discussed in Love, and hardly the most crucial. The Court pointed out that "a driver's license may not be so vital and essential as are social insurance payments [deal with in Eldridge] on which the recipient may depend for his very subsistence". Id. (Under Eldridge a social security beneficiary may be deprived of benefits for as much as a year or more while hearings take place.) The Court went on to say, "Moreover, the risk of an erroneous deprivation in the absence of a prior hearing is not great." The same is true here. The only question is the existence or non-existence of a readily observable fact. One is hard put to think of a genuine factual or legal issue which would exist in the generality of cases. To be sure, the issue plaintiff asserts here, whether an initial refusal followed by a later request to take the test qualifies as a refusal, may be the rare exception. If an arrestee can wait until his blood or breath levels show less alcohol, the usefulness of the test is diminished; on the other hand, the Registrar or

state courts may find it unreasonable for the police not to accommodate a change of heart made in good faith with reasonable promptness. Once settled, however, such a matter of statutory interpretation would be non-recurring; and it is difficult to imagine similar issues that are likely to arise in the administration of this utterly simple statute.

To be sure, a driver might assert that the police had required the test after arresting him without cause. But it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest; if improperly arrested, he would take the test and sue for false arrest, not put his license in jeopardy. And if the licensee feels that he is the victim of false police affidavits, he would be raising a claim to which the Illinois point system is equally vulnerable. If a police officer or bureaucrat is willing deliberately to commit perjury, the citizen's ultimate recourse must be under various state and federal tort and criminal statutes. In 999 cases out of 1,000 I cannot see what there will ever be to try concerning the fact of refusal to take a chemical or blood test. And conceding that, on a rare occasion, that one meritorious case will arise, the opportunity for immediate hearing which Massachusetts affords seems to me to go

far to obviate hardship.[5] While such a rare case would likely involve disputed facts requiring the taking of evidence, and thus would involve surrender of the license in the interim, it does not seem unfair to require a licensee who, on the sworn affidavits of the officers has declined to take the test, to put up with that hardship. To strike the balance the other way -- to permit people to litigate such an unlikely

---

5. The Love Court recognized the possibility of occasional clerical error but felt this did not outweight the state's interest in summary procedures. Overall, the Illinois point scheme, of which Love upheld one small feature, is far more complicated than the very simple Massachusetts statute now before us, inviting more administrative errors. Plaintiff's claim here is not, of course, based on administrative error at all. It raises a question that plainly could not have been resolved in the simple, non-evidentiary type of pre-suspension hearing which is all my brothers say is constitutionally necessary before a suspension. Simple errors of the type my brothers' procedure might eliminate can be solved under the existing Massachusetts law either by informal communication between the driver and the police and/or registrar, or else at the non-evidentiary hearing available the same day the driver turns in this license.

question while retaining their licenses -- seems to me to impose an unfair added burden upon the society that ultimately pays both the costs of drunken driving and the salaries of the additional registry officials needed to administer a more elaborate system.

Finally, I have great difficulty with my brothers' confident assertion that "nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the highway." This may be their belief, but it clearly is not shared by the Massachusetts Legislature, the Registrar of Motor Vehicles, or the Attorney General, all of whom are charged, as the federal courts are not, with the primary duty to make this sort of judgment. As I argued in my earlier dissenting opinion, and as the Love Court has said,

> ". . . the substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case. Giving licensees the choice thus automatically to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full

administrative hearings. . . ." 45 U.S.L.W. at 4450.

My brothers seek to avoid the implications of this statement by stating that they do not require nor view as constitutionally necessary "a pre-suspension evidentiary hearing". They concur with plaintiff's counsel who, in final argument, made the statement "we do not insist upon a hearing -- just notice and an opportunity to respond." Plaintiff forgets, however, that in arguing the inadequacy of the hearing which the Registry offers when a licensee surrenders his license, his principal argument was that the hearing when commenced was non-evidentiary, and hence incapable of immediately resolving the factual dispute which had arisen. I suggest that a non-evidentiary pre-suspension hearing would have been totally useless to plaintiff. His case can only be resolved in light of testimony, as he seemed to concede. See note 1 supra. Individuals such as plaintiff who wish to assert a factually disputed claim will gain nothing from a non-evidentiary hearing. All a non-evidentiary hearing prior to suspension would do is cure simple mix-ups. But this function is perfectly well accomplished by the non-evidentiary hearing which a licensee may obtain the day he surrenders his license. What Massa-

chusetts now provides -- the opportunity for a full hearing beginning the very day the driver hands in his license -- seems to me to strike a reasonable balance between the individual's interests and those of the state.

It is worth focusing, moreover, on the problem faced by Massachusetts. It is dealing with a problem -- arrested drivers refusing to take the test -- which even under the challenged Massachusetts system arises in that state 300 times a month. Meaningful machinery to deal with the problem has to be capable of mass administration. Intoxicated drivers can often talk their way out of a drunken driving conviction, in court, if the police do not have in hand the results of a scientific test taken at the moment of arrest. To the extent drivers are afforded increased opportunities before suspension to delay and litigate any suspension, they will be encouraged to try their chances with a refusal. Even if finally required to forego the license (for 90 days) much time will have transpired, and the state will have had to expend time and money in what in virtually all instances will be useless administrative proceedings invoked simply to buy time or in the hope that something favorable will turn up.

I think that Massachusetts could rationally determine that the procedure in question was the most practical and effective one. The non-evidentiary

pre-suspension hearing my brothers seem to require will add no measurable protection to the present system; if, on the other hand, they mean to require a hearing that will enable the Registrar to delay suspension until after investigation into contested facts, they are proposing something which will constitute a serious encumbrance. Since the present system is fundamentally fair, since it is devised to deal with a problem of compelling importance to the state, since it was adopted by the people (most of whom drive) through their legislators (most of whom drive), and since the potential for hardship to an innocent person seems altogether minimal in comparison with the interests served, I think the Massachusetts law should be sustained. While there are inconsequential differences between it and the Illinois system at issue in Love, the principles in Love seem to be to be dispositive.

I would allow the motion for reconsideration, vacate the injunction, and dismiss the complaint.

Levin H. Campbell,
Circuit Judge

APPENDIX B

October 6, 1977

Mr. Michael Rodak, Jr.
Clerk's Office
U.S. Supreme Court
Washington, D. C. 20231

Dear Sir:

Enclosed are ten copies of a memorandum I received from the United States District Court. This matter is before the Court on appeal, #77-69. I would appreciate your bringing this memorandum to the attention of the Court.

Very truly yours,

Robert W. Hagopian

RWH:hfc
Enclosure
cc: S. Stephen Rosenfeld, Esq.
Mitchell J. Sikora, Jr.
Assistant Attorneys General

APPENDIX C

October 14, 1977

Robert W. Hagopian, Esq.
380 Putnam Avenue
Cambridge, Massachusetts 02139

Re: Robert A. Panora v.
Donald E. Montrym,
et al., No. 77-69

Dear Mr. Hagopian:

Receipt is acknowledged of your letter of October 7, 1977, together with xerox copies of a memorandum opinion of the United States District Court for the District Of Massachusetts.

I am not aware of any rule that would permit this office to distribute matters of this nature to the Court and your attention is directed to Rule 16(5) of the rules of this Court.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: Mitchell J. Sikora, Jr., Esq.
One Ashburton Place
2019 McCormack Building
Boston, Massachusetts 02108

Enclosures

APPENDIX D

October 25, 1977

Mr. Michael Rodak, Jr.
Clerk's Office
Supreme Court of the United States
Washington, D. C. 20543

Dear Mr. Rodak:

This is to acknowledge your letter of October 14, 1977 with respect to Panora v. Montrym, et al., No. 77-69. You state that you are not aware of any rule that would permit the clerk's office to distribute matters "of this nature" to the court. I cannot understand this view as the Memorandum I forwarded you on September 7, 1977 was a supplemental final opinion by the three judge court whose judgment has been appealed to the court and is pending before the court. Rule 15(a) & (h) require that such opinions be filed.

As an appellee in this case, I requested that you bring this matter to the attention of the court. In so doing, I felt that this was a basic obligation on my part as an officer of the court. If the clerk's office does not so chose to transmit this opinion to the court, then I will have to leave this to your discretion.

Very truly yours,

Robert W. Hagopian

RWH:hfc

cc: Mitchell J. Sikora, Jr., Esq.

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-69.

ROBERT A. PANORA, REGISTRAR OF MOTOR VEHICLES OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

v.

DONALD E. MONTRYM, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Appellant's (1) Response to Appellee's Motion to Vacate, and (2) Motion for Summary Reversal.

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
MITCHELL J. SIKORA, JR.,
STEVEN A. RUSCONI,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1020
Attorneys for Appellant.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-69.

ROBERT A. PANORA, REGISTRAR OF MOTOR VEHICLES
OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

v.

DONALD E. MONTRYM, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Appellant's (1) Response to Appellee's Motion to Vacate, and (2) Motion for Summary Reversal.

Introduction.

In this case the Massachusetts Registrar of Motor Vehicles appeals a decision of a three-judge district court invalidating the state's "implied consent" or "breathalyzer" statute on

due process grounds. The history of this appeal is somewhat unusual. Consequently, the Massachusetts Attorney General, on behalf of the appellant Registrar, wishes to draw the Court's attention to the following chronology.

(1) On March 25, 1977, the United States District Court for the District of Massachusetts, by 2-1 vote, filed its opinions invalidating the state statute.

(2) On May 4, that court entered final judgment upon the majority opinion.

(3) On May 13, the appellant Registrar filed his notice of appeal to the United States Supreme Court.

(4) On July 12, the appellant Registrar filed in the United States Supreme Court his Jurisdictional Statement, including at page 12, footnote 9, the information that he had moved the district court to stay judgment and to modify judgment in light of the intervening decision of *Dixon* v. *Love*, 431 U.S. 105 (1977).

(5) On October 7, the Massachusetts Attorney General's office received from the district court copies of its further opinions and order issued on October 6 and addressing the decision of *Dixon* v. *Love*.

(6) On October 11, the Attorney General's office received a copy of a letter dated October 7, 1977, from appellee Montrym's attorney to the Clerk of the Supreme Court covering an enclosure of 10 copies of the further opinions and order of the district court rendered on October 6.

(7) On October 26, the Attorney's General's office received a copy of a letter from Montrym's attorney to the Clerk acknowledging his refusal to transmit the October 6 district court material to the Court. We had not received a copy of an intervening letter of October 14 to this effect and were unaware of the nontransmittal until October 26.

(8) On October 31 we learned from press inquiries that the Supreme Court had vacated the judgment of the district

court and remanded the case to it for further consideration in light of *Dixon* v. *Love*. We received formal notice of the decision from the Court on November 4.

(9) Since the Court's decision of October 31, the Massachusetts Registrar, upon the advice of the Attorney General, has withheld enforcement of the state's implied consent statute and abided by the terms of the district court's decisions until further disposition of the case. We have proposed in writing to Montrym's attorney that the parties appear before the three-judge district court for some guidance.

(10) Montrym's attorney has filed a now pending motion to vacate the court's judgment of October 31 and included, *inter alia*, the district's court's further opinions.

We explain the sequence of events particularly to respond to representations included at pp. 3-4 and nn. 1-2 of Montrym's pending motion to vacate. The tenor of these remarks is that the Massachusetts Attorney General intentionally failed to inform the Court of the district court's further opinions of October 6, addressing the decision of *Dixon* v. *Love*. The statement in footnote 1 is inaccurate.

The Massachusetts Registrar of Motor Vehicles continues to comply with the decisions of the district court, and the Attorney General stands ready to assist the Supreme Court in any further consideration of this case.

Response to Appellee's Motion to Vacate Judgment and Motion for Summary Reversal.

In light of the foregoing chronology and in response to the appellee's pending motion to vacate judgment, the appellant Registrar moves that the Court summarily reverse the decision of the district court or, in the alternative, set the case for plenary consideration.

As grounds therefor the Registrar says that the case has reached a conclusion in the district court, and that the majority of the district court have misapplied the law of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Dixon* v. *Love*, 431 U.S. 105 (1977), for the reasons set out in pages 12-16 of the Jurisdictional Statement and in the opinions of the dissenting judge of the district court. For the reasons also stated in the Jurisdictional Statement the case presents a substantial question.

Conclusion.

The present case is fit for final disposition. The appellant respectfully urges the Court to reverse summarily the decision of the district court or to set the case for argument.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
MITCHELL J. SIKORA, JR.,
STEVEN A. RUSCONI,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1020
Attorneys for the Appellant.

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-69.

ROBERT A. PANORA,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Appellant's Supplemental Brief.

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
MITCHELL J. SIKORA, JR.,
STEVEN A. RUSCONI,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1032
Attorneys for the Appellant.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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v.

DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Appellant's Supplemental Brief.

Introduction.

The appellant Massachusetts Registrar of Motor Vehicles files the present Supplemental Brief in response to the Court's order of February 21, 1978. That order permitted the parties to file such briefs on the subject of the further

opinion of the district court rendered on October 6, 1977, and now reported at 438 F. Supp. 1157. In its second opinion the district court addressed the effect of *Dixon* v. *Love*, 431 U.S. 105 (1977), upon its original decision to invalidate the Massachusetts implied consent or "breathalyzer" statute, and denied the appellant Registrar's motion to stay and to modify judgment in light of the intervening *Love* decision. In the belief that the district court's second opinion is a further misapplication of due process doctrine governing the entitlement to a prior hearing in the administration of motor vehicle implied consent laws,[1] the Massachusetts Registrar submits the following argument.

Argument.

I. By Due Process Standards, The Massachusetts Implied Consent Statute Compares Favorably With The Illinois Habitual Offender Law Upheld In Dixon v. Love.

The present appeal shares strong common features with *Dixon* v. *Love*. There, a driver challenged an Illinois statutory program for the summary suspension or revocation of a driver's license based solely upon the content of official records. The Illinois system did not extend a full administrative hearing until after suspension or revocation.

[1] As in the original decision, the three-judge panel divided by 2-1 vote in its second opinion. Circuit Judge Cambell filed a further dissenting opinion. 438 F. Supp. 1157, 1161-1165. A full procedural chronology of the present appeal appears in the earlier filed Appellant's (1) Response to Appellee's Motion to Vacate, and (2) Motion for Summary Reversal, at pp. 1-3.

The Court found that it satisfied due process. Here the challenged statute similarly provides for suspension upon the basis of official records and similarly affords an administrative hearing after suspension. A corresponding decision in favor of its constitutionality is in order.

The due process claim in *Love* involved the Illinois Driver Licensing Laws. The contested provision, Ill. Rev. St. c. 95 ½, § 6-206, directed the Secretary of State to suspend or revoke a driving permit "without a preliminary hearing upon a showing by his records or other sufficient evidence" that a driver's conduct fell into any one of eighteen categories enumerated in the statute. Ill. Rev. St. c. 95 ½, § 6-206(a). The Secretary under his administrative authority adopted regulations further defining conduct warranting a summary suspension or revocation by his office. Thus, where the statute conferred discretion upon the Secretary to suspend or revoke a driving permit of a licensee repeatedly convicted of moving traffic violations, § 6-206(a)(3), the Secretary adopted a regulation mandating revocation of a license suspended three times within a ten-year period.

Under the same statutory scheme, once a license had been suspended or revoked the licensee could request a full administrative hearing. Within twenty days of receiving a written request for a hearing, the Secretary had to schedule a hearing date. Though the hearing need not take place within the same twenty days, it had to be held "as early as practical." Section 2-118(a). Also, where a license had been suspended or revoked, the driver could obtain either a restricted permit for commercial use or a restricted permit to relieve undue hardship. These provisions were not self-executing and required the applicant to carry the burden of establishing eligibility through either affidavit or an administrative hearing. Section 6-206(c)(2), (3).

In *Love* a truck driver's records at the Secretary of State's office showed that his license had been suspended three times within a ten-year period. The Secretary, pursuant to his regulations, summarily suspended the truck driver's license. The truck driver then challenged not the adequacy of the post-suspension administrative hearing, but only its timing. Such a hearing, the licensee claimed, should occur prior to any suspension or revocation.

The Court rejected this claim by application of the standards set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In the present case the challenged statute, Mass. Gen. Laws c. 90, § 24(1)(f), directs the Registrar to suspend for ninety days an individual's license to operate a motor vehicle when he receives a report that the individual refused to submit to a chemical analysis of his breath. The report must include a statement of the driver's arrest for operating a motor vehicle under the influence of alcohol, of the observations by the police officer leading to arrest, and of the driver's refusal of the chemical analysis of his breath

after notice that refusal would result in the suspension of his license for ninety days. The act of refusal is required to be witnessed by an observer and the whole report is sworn to and signed under the pains and penalties of perjury by the arresting officer.

Pursuant to Mass. Gen. Laws c. 90, § 24(1)(g), when a person whose license has been suspended by the Registrar for refusal to submit to a chemical test or analysis of his breath so requests, the Registrar must grant him a hearing on the suspension. The hearing is available on the same day on which the licensee surrenders his license.[2] Despite the immediate availability of a hearing upon suspension, the plaintiff below, as did the truck driver in *Love*, claims that such a hearing should be held prior to the Registrar's action. Consequently, we measure the Massachusetts law by the criteria of the *Love* decision.

II. The Private Interest In A Driver's License Is The Same Under Both The Illinois And Massachusetts Laws.

As to the nature of the private interest involved in a driver's license, this Court noted in *Love* that, while a licensee could not be made entirely whole if his license were to be reinstated after a full administrative hearing, a driver's license is not necessarily so vital that it is essential to the very subsistence of the licensee.[3] Furthermore, since the Illinois statute made special provision for hardship cases

[2]The district court majority acknowledged the availability of this "same day" hearing, but concluded that it feasibly reached only obvious or clerical errors and served inadequately for deeper factual disputes. 438 F. Supp. 1157, 1159-1160 n. 2. They infer the likely delay of a fully adequate hearing to a later point in the suspension when fuller evidence will have been gathered and can be presented. *Id.*, 1159.

[3]431 U.S. 105, 113 (1977).

where the license to operate a motor vehicle might be necessary to maintain a livelihood, the Court concluded that something less than an evidentiary hearing was required prior to the driver's license.[4]

The Massachusetts statutory scheme provides anyone, no matter how essential a part the license to operate a motor vehicle may play in his or her daily life, with the opportunity to obtain an immediate hearing on the issue of suspension. Though a full administrative hearing may require a short time to summon any necessary witnesses, the hearing begins upon the very day of its request. Such a procedure is not only more accommodating to the licensee than the Illinois scheme but expeditious as well. In Illinois a hearing, if requested, need not be *scheduled* for up to twenty days after receipt of such a request and even then need only be set for a date as "early as practical." Section 2-118(a). Also, as noted above, the same statutory scheme placed the burden upon the licensee to establish his eligibility for the special hardship provisions which may result in the issuance of a limited permit to operate a motor vehicle after the suspension or revocation has taken place.

Here the district court claimed additional weight for the private interest at stake. It reasoned that since Massachusetts makes no provision for hardship relief, as does Illinois, the potential for economic hardship is far greater in Massachusetts than in Illinois.[5] However, the court below failed to recognize that the hardship provisions are not available until after the suspension or revocation and that then the burden rests upon the licensee by way of a hearing or affidavit to establish eligibility. Section 6-206(c)(2), (3).

[4] *Id.*

[5] See 438 F. Supp. 1157, 1159. Compare *Dixon* v. *Love*, 431 U.S. 105, 114 n. 10.

As the Circuit Judge pointed out in his dissent, these procedures may take some time.[6] Even without hardship provisions, the Massachusetts opportunity for a licensee to obtain an immediate hearing to contest the suspension is equally effective, if not more so, for the cure of any hardship possible from erroneous suspension.

Finally, we question the strength of a distinction built upon the exceptional hardship case of the professional truck, bus, or taxi driver, rather than upon the usual suspension of an uncooperative intoxicated driver confronting inconvenience rather than hardship. Nothing in the Massachusetts law prevents the sensible expedition of hearings for the special hardship case. More importantly, however, due process doctrine should turn on the general, and not the unusual, case. *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976). The district court's rationale on this point should not remove the case from the control of the *Love* decision.

III. In Massachusetts The Risk Of An Erroneous Suspension Of The Driver's License Is Minimized By Safeguards.

As for the second critical factor, the analysis of the risk of erroneous deprivation by this Court in *Dixon* v. *Love* reduced to a question whether additional procedural safeguards would be of significant value in reducing the number of erroneous deprivations.[7] There this Court noted that while the risk of clerical error existed in the records of the Secretary, such errors could readily be brought to the

[6] 438 F. Supp. 1157, 1163.

[7] 431 U.S. 105, 114.

Secretary's attention. Further assurance against error arose from the adjudicated convictions themselves constituting the records. In these circumstances a pre-suspension hearing would have little meaning. It would merely give the licensee the opportunity to plead for leniency and would not significantly reduce the risk of erroneous deprivations.

Under the Massachusetts statute, the addition of a pre-suspension hearing would have a similar minimal value. The action of the Registrar is based on an official record, namely, the report of refusal. The filing of the report is triggered by the occurrence of a simple and readily observable fact, the refusal to submit to a chemical test. This fact is attested to under the pains and penalties of perjury by the arresting police officer and is also witnessed by another person. This report in the vast majority of cases will be reliable. While a clerical error of some type may occur, nothing prevents the immediate attention of the Registrar to such an error, especially at the "same day" hearing.

In this branch of its discussion, the district court stated that a pre-suspension hearing need not take the form of an evidentiary hearing, and that it need only afford the licensee a chance to alert the Registrar to the possibility that a suspension is unwarranted and would be unjust.[8] The statutorily required officer's affidavit and additional witness of the refusal already serve the purpose of factual accuracy. A further requisite pre-suspension hearing would more likely become the occasion for delay, angle-playing, and leniency pleas.[9]

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[8]438 F. Supp. 1157, 1159-1160 n. 2.

[9]The district court focused upon the driver's claim of his willingness to take the test and upon an ambiguous state court disposition of that claim. 438 F. Supp. 1157, 1161. Those circumstances are explicable as the driver's belated change of mind after a stay at the station house and his claim that the police did not respond to his delayed willingness. We doubt that a constitutional entitlement to pre-suspension hearing should ride upon the factual issue of an intoxicant's change of mood after the initial test offer. Again, we question the district court's tendency to expand the exceptional case to the general one as a predicate for constitutional rules.

IV. The Governmental Interest In The Deterrence And Removal Of Unsafe Drivers From The Highways Is Equally Strong Under Both The Massachusetts And Illinois Statutes.

The Massachusetts law serves the goals of both highway safety and administrative efficiency in its courts and motor vehicle Registry.

As a policy of safety, obviously the prospect of a prompt suspension, unavoidable through a prior hearing regime, encourages drivers to submit to the breathalyzer test. The test yields objective and usually conclusive evidence of the charge of intoxicated driving. The objectivity of the evidence is doubly valuable: it promotes the conviction of the guilty, and the exculpation of the innocent. Convictions, in turn, will build to a loss of license and removal from the roads of the habitual offender. Moreover, the implied consent system, confronting the potential offender with the prospect of a prompt suspension on the one hand, and a likely conviction on the other, carries its own deterrent value against drunken driving. Accurate dispositions, license sanctions, and general deterrence all turn on the driver's inability to parry and temporize against the suspension sanction through the medium of an automatic prior hearing system.

Obvious efficiencies also accrue to the government. It is relieved of the administrative burden of a hearing system likely to be employed by all drivers resisting the breatha-

lyzer. That number is likely to grow with the very awareness of such a prior hearing process. In addition, the full evidentiary character of such hearings will be appreciable. While the district court majority suggests that some quick opportunity for emergency relief followed by a more thorough hearing on the factual dispute over the test refusal would bring a constitutional cure,[10] the dissenting judge more realistically observes that little short of a full evidentiary exercise will resolve the typical dispute.[11] Further, the probative value of the test eliminates the burden of trial for both the innocent and the intoxicant facing an inevitable adjudication of guilt and therefore prone to plead accordingly. Finally, the state is spared the practices of delay, gamesmanship, influence and money launched against officers charged with enforcement of hearings against drivers bent on the preservation of their licenses.

The majority of the district court rejected the governmental interests, somewhat narrowly, with the observation that a compliant intoxicant retains his license by submission to the test. Thus they doubted the utility of the scheme for highway safety since the drunken driver could remain on the road in spite of the statute.[12] This rationale is hardly a comprehensive assessment of the law's usefulness. It neglects the values of conclusive evidence, deterrence, and conviction consequences discussed above. In particular, it mistakenly equates the postponement of a sanction with the total escape of punishment; for while a cooperative intoxicant preserves his license for the immediate interim, the test results set in motion his conviction and any accompanying license loss appropriate for the repeated offender.

[10] 438 F. Supp. 1157, 1159-1160 n. 2.
[11] 438 F. Supp. 1157, 1164 & n. 5.
[12] 438 F. Supp. 1157, 1161.

And conviction short of license loss may have its sobering effect, as the driver incurs punishment and moves closer to the license sanctions attending a further offense. The district court's selective focus on a short-run anomaly of the statute should not substitute for a thorough and balanced judgment of its service.

Conclusion.

Because the second opinion of the district court is a further misapplication of the decisions in *Mathews* v. *Eldridge* and *Dixon* v. *Love*, the Supreme Court should reverse summarily the judgment below or set the case down for argument.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
MITCHELL J. SIKORA, JR.,
STEVEN A. RUSCONI,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1032
Attorneys for the Appellant.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-69

ROBERT A. PANORA, Registrar of Motor Vehicles of the Commonwealth of Massachusetts,
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DONALD E. MONTRYM, et al.,
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On Appeal From the United States District Court for the District of Massachusetts

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO AFFIRM

Robert W. Hagopian, Esq.
c/o Orion Research Inc.
380 Putnam Avenue
Cambridge, Massachusetts 02
(617) 864-5400

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On Appeal From the United States District Court for the District of Massachusetts

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO AFFIRM

INTRODUCTION

In light of the district court's October 6, 1977 opinion, and pursuant to this Court's February 21, 1978 order, this memorandum is submitted to supplement appellee's motion to affirm.

ARGUMENT

I The Private Interest Affected Under G.L. Ch. 90 Section 24(1)(f) Is Far Greater Than The Interest Under The Illinois Procedure Under Consideration In Dixon v. Love, 431 U.S. 105.

Montrym asserts that the total loss of one's driver's license is a deprivation of an entitlement sufficient to invoke the protection of the Due Process Clause:

> Once [driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that ajudicates important interest of the licensees. In such cases, the licenses are not to be taken away without that due process required by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 539.

As such, this court required "notice and opportunity for hearing appropriate, to the nature of the case, before termination

becomes effective," Bell v. Burson, supra, at 542. Notwithstanding the Bell pronouncements, the Registrar in his Jurisdictional Statement at pp. 12-13 argues that Dixon v. Love, 431 U.S. 105, "concludes" that the driver's license interest "is not so great as to require a prior hearing" before suspension.

Montrym maintains that the driver's license interest in Dixon is distinguishable from the instant case since the Illinois procedure takes into account "undue hardship" by providing for commercial driver permits and restricted permits allowing driving between a licensee's residence and place of employment. These provisions ameliorate the potential loss "in the pursuit of a [licensee's] livelihood". On the other hand, the Massachusetts procedure has no comparable provisions. Accordingly, Montrym maintains that the district court's finding that the license loss under G.L. Ch. 90 §24(1)(f) constitutes irreparable harm is eminently correct. Indeed, all the federal court decisions

that have considered the issue have reached the same conclusion.1

II The Risk Of Error Under The Massachusetts Procedure Is Far Greater Than Under The Illinois Procedure.

Under the Illinois procedure, revocation by the Secretary of State was automatic and based upon three suspensions within a ten year period. Each suspension in turn was predicated upon a final adjudication of guilty by a court of competent jurisdiction. As such, this Court held in Dixon, supra, at pp. 108-9, that the risk of erroneous deprivation was minimal:

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1 Besides the cases cited in appellee's motion to affirm at pp. 5-6, see Cicchetti v. Lucey, 377 F. Supp. 215 (D. Mass.), rev'd on other grounds, 514 F. 2d 362 (1st Cir. 1975); and Pollard v. Panora, 411 F. Supp. 580 (three judge court, D. Mass. 1976). See also Judge Campbell's dissent set forth in the Registrar's Jurisdictional Statement at p. 20a: "There is my brothers say, no way to make, someone whole for mistaken deprivation of a license. I suppose [this] has to be conceded."

> Under the Secretary's regulations, suspension and revocation decisions are largely automatic. Of course, there is the possibility of clerical error, but written objection will bring a matter of that kind to the Secretary's attention. In this case appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based. Appellee has not challenged the validity of those convictions or the adequacy of his procedural rights at the time they were determined. ... We conclude that requiring additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations.

By contrast, the predicate for suspension under G.L. Ch. 90 §24(1) (f) & (g) depends upon the following:

> (1) Was there probable cause for the licensee's arrest?
> (2) Was there an arrest?
> (3) Did the licensee refuse to submit to the breathalyzer

test after having been informed that his license shall be suspended for a period of ninety days for refusing to take the test?

Under the procedure, a police officer, before whom the licensee allegedly refused to take the breathalyzer test, files a one page "form" affidavit with the Registrar setting forth the grounds for the officer's belief that the licensee had been driving under the influence of intoxicating liquor and that he refused to take the breathalyzer test and, further, that the licensee was in fact arrested for driving under the influence of intoxicating liquor. Upon receipt of the form affidavit, the Registrar automatically suspends the driver's license.

On the basis of the one page "form" affidavit, the Registrar maintains at p. 14 of his Jurisdictional Statement that the risk of factual error under the Massachusetts procedure is minimal because one must assume that the police officer's report will be reliable. Montrym, on the other hand, traverses the Registrar's presumption. He asserts that the risk of factual error is substantial because the Registrar's determination is based solely on the accuser's affidavit and, secondly, because the

basis for revocation is predicated upon subjective facts.[2] As such, Montrym maintains that the risk is not even comparable to that under the Illinois procedure which involved a narrow inquiry into objectively ascertainable court convictions.[3]

III The Public Interest Would Not Be Affected By The Availability Of A Pretermination Opportunity To Respond.

Under G.L. Ch. 90, §24(1)(f), if a licensee takes the breathalyzer and

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2 Apart from the possibility of factual error, there also lies the risk of error in the Registrar's application of the law to the facts in determining whether there was probable cause to justify an arrest, and whether there was a valid arrest.

3 In the instant case, a Massachusetts district court dismissed the criminal charges brought against Montrym and entered a specific finding of fact that the police had refused to give him the breathalyzer test. The Registrar was bound by this decision under principles of collateral estoppel. Cf. Almeida v. Lucey, 372 F. Supp. 109 (D. Mass.), aff'd 419 U.S. 806; and Costarelli v. Panora, 423 F. Supp. 1309 (D. Mass.), aff'd 431 U.S. 934. Notwithstanding the specific findings of fact by the district court, the Registrar refused to return Mr. Montrym's license.

flunks the test, the Registrar does not suspend his license until and unless he is subsequently found guilty by a judicial tribunal of driving under the influence of intoxicating liquor, an offense under G.L. Ch. 90 §24(1)(a) & (b). Accordingly, there is no legitimate state interest in denying a licensee a minimal opportunity to respond[4] prior to the Registrar's action in revoking his license for failure to take the breathalyzer test. Far more important, however, is the fact that since the passage of Chapter 505 of the Acts of 1975, G.L. Ch. 90 §24D, ninety-five percent of all licensees charged with, or found guilty of, driving under the influence of intoxicating liquors elects to enter the Driver Educational Alcohol Program. Under this procedure, the criminal charges are continued without a finding of guilty being entered upon the record. Consequently, the Registrar does not revoke the licenses of almost all drivers who are

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4 Montrym does not maintain that the Constitution requires a presuspension hearing before termination. His position is simply that Massachusetts must afford him an opportunity to respond or "to present his side of the story," Goss v. Lopez, 419 U.S. 565, 580, 583-584.

truly drunks on the road.[5] We think the passage of Chapter 505 manifests a legislative judgment that it is not necessary to remove drunk drivers from the highways and, accordingly, we cannot understand what legitimate state purpose would be achieved in denying an accused licensee the opportunity to respond prior to having his license revoked under Ch. 90 §24(1)(f).

CONCLUSION

For the reasons set forth above, Montrym maintains the district court's conclusion that Dixon v. Love, supra, is distinguishable, and not controlling, should be sustained. Accordingly, Montrym moves this court to summarily affirm the judgment below or, alternatively, set this case down for plenary consideration.

By his attorney,

Robert W. Hagopian
c/o Orion Research Inc.
380 Putnam Avenue
Cambridge, MA 02139
(617) 864-5400

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5 Some district courts do suspend the driver's license for periods between thirty and ninety days as a precondition to a licensee's entering the Driver Educational Alcohol Program. However, some of these courts permit hardship licenses similar to those granted under the Illinois procedure. This practice varies according to geographical location within Massachusetts.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellant.

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
Assistant Attorney General,
MITCHELL J. SIKORA, JR.,
Assistant Attorney General,
STEVEN A. RUSCONI,
Assistant Attorney General,

Department of the Attorney General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1032
Attorneys for Appellant.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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MISCELLANEOUS.

In the
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Brief for the Appellant.

Opinions Below.

A three-judge panel of the United States District Court for the District of Massachusetts has rendered two decisions in the present case.

The original 2-1 decision of the district court, declaring the Massachusetts implied consent statute unconstitutional and enjoining its enforcement, is reported at 429 F. Supp. 393 (D. Mass. 1977). The majority and dissenting opinions, dated March 25, 1977, are reproduced as Appendix A of the Jurisdictional Statement, at pages 1a-23a.

The subsequent 2-1 decision of the district court, denying the defendant Registrar's motion to reconsider its refusal to stay and to modify judgment, is reported at 438 F. Supp. 1157 (D. Mass. 1977). The majority and dissenting opinions, dated October 6, 1977, are reproduced in the Record Appendix at pages 78-93.

Jurisdiction.

The district court on April 4, 1977, entered partial summary judgment declaring the Massachusetts implied consent statute, M.G.L. c. 90, § 24(1)(f), unconstitutional (A. 55). On April 12, 1977, the defendant-appellant Registrar filed his notice of appeal to the United States Supreme Court (A. 4, 58). The Registrar filed his jurisdictional statement on July 12, 1977. This Court noted probable jurisdiction on April 17, 1978. The jurisdiction of the Court derives from 28 U.S.C. § 1253.

Statutory Provision Involved.

The validity of Massachusetts General Laws, c. 90, § 24(1)(f), is involved. That provision provides in full as follows.

Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be made on a form approved by the registrar, and shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief, as defined in section one of chapter ninety C, or by the person

> authorized by him and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person under this chapter or the right of such person to operate motor vehicles in the commonwealth under section ten for a period of ninety days.

The text of the statute is presently located at page 95 of the 1978-1979 Cumulative Annual Pocket Part of Volume 11, Massachusetts General Laws Annotated (West Publishing Company, 1969).

Question Presented.

Whether a statute imposing a uniform temporary suspension of a driver's license for his refusal to take a chemical or breath analysis test upon arrest for drunken driving violates the Due Process Clause of the Fourteenth Amendment by providing a post-suspension hearing rather than a pre-suspension hearing at which the driver may dispute his refusal to take the test.

Statement of the Case.

Prior Proceedings.

On July 2, 1976, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the plaintiff-appellee Donald Montrym

began in the United States District Court for the District of Massachusetts the present class action for declaratory and injunctive relief against enforcement by the Registrar of Motor Vehicles of the Massachusetts implied consent statute authorizing the suspension of a driver's license for refusal to take a chemical or breath analysis test upon arrest for drunken driving (A. 1, 6-12). On July 9, 1976, the Registrar assented to, and a single judge entered, a temporary restraining order against the suspension of Montrym's driver's license (A. 23). The restraining order has remained in effect throughout the litigation (*id.*).

In accordance with 28 U.S.C. §§ 2281 and 2284, as then effective, a three-judge court convened (A. 24). The Registrar filed an answer (A. 3, 25-27). Montrym filed motions for a preliminary injunction and for partial summary judgment of the unconstitutionality of the implied consent law.[1] The parties thereafter filed a stipulation of undisputed facts and relevant documents (A. 24, 28-52),[2] submitted memoranda of law (A. 3, 24) and on January 12, 1977, argued the merits of the motions to the three-judge court (A. 3).

On March 25, 1977, the three-judge panel rendered an opinion certifying the class action 429 F. Supp. 393, 400,

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[1] The motion appears to have been one for partial, rather than full, summary judgment because Montrym wished to pursue additional remedies of compensatory and punitive damages, as well as attorney's fees. Complaint, paragraphs 26, 27, 28 (A. 11-12).

[2] In its second decision, the district court majority stated its understanding that Montrym had never executed the stipulation of facts. 438 F. Supp. 1157, 1159 n. 1. Our examination of the original papers on file with the district court shows Montrym's counsel to have executed an original of the stipulation but not the additional copies filed for use by the panel members. This condition of the papers appears to have confused the panel. The dissenting judge correctly believed the stipulation to be in effect, just as Montrym's counsel represented to him during oral argument. 438 F. Supp. 1157, 1162 n. 1a.

and concluding that the statute violated the Due Process Clause of the Fourteenth Amendment. *Id.*, 398-400. On April 4, 1977, the majority of the panel entered partial summary judgment for Montrym (A. 4, 55). On April 12, at the Registrar's request (A. 4, 56), the majority entered a clarification of its judgment, expressly declaring the statute unconstitutional on its face and permanently enjoining the Registrar from its enforcement (A. 4, 57). Also on April 12, the Registrar filed in the district court his notice of appeal to the Supreme Court (A. 4, 58).[3]

On April 14, Montrym filed another proposed judgment to include the additional order that the Registrar return the suspended licenses of all members of the plaintiff class (A. 4). The majority of the district court entered it as a "final judgment" (A. 63-64). On May 13, the Registrar filed a notice of appeal from that judgment (A. 65). At the same time he filed a motion for stay of judgment and order pursuant to Supreme Court Rule 18 with a supporting affidavit (A. 66-74) and a motion for relief from judgment (A. 75-76). On May 24, the majority of the district court denied both motions (A. 67, 76). On June 1, the Registrar moved for reconsideration of his prior motions to stay judgment and to modify judgment on the basis of the newly decided *Dixon* v. *Love*, 431 U.S. 105 (May 16, 1977) (A. 77). On October 6, 1977, the district court, by 2-1 decision, denied the motion for reconsideration (A. 78-93).

Copies of the October 6 decision were forwarded to the Supreme Court but were not docketed. Consequently the

[3] From April 20 onward, the docket entries of the district court failed to reflect the papers filed by the parties, perhaps because on April 20 the district court clerk forwarded a certified copy of docket entries and pleadings to the Supreme Court and considered the case inactive. In all events, the parties filed, and the district court considered, a number of post-judgment motions included in the Appendix and discussed below.

Court on October 31 vacated the judgment of the district court and remanded the case to it for further consideration in light of *Dixon* v. *Love*. Thereafter the Registrar continued to abide by the original judgment, and the parties informed the Court of the district court's second decision. The Court on February 21, 1978, reinstated the judgment of the district court, restored the appeal to its docket, and invited supplemental briefs from the parties. After submission of briefs, the Court on April 17 noted probable jurisdiction.

Facts.

At approximately 8:15 p.m. on the evening of May 15, 1976, Donald E. Montrym, a licensed Massachusetts driver, was involved in a collision between his station wagon and a motorcycle (A. 28). The accident occurred upon a public way in the town of Acton, Massachusetts. At about 8:30 p.m. an Acton police officer arrested Montrym and charged him with the offenses of operating under the influence of intoxicating liquor, driving to endanger, and failing to have his registration in his possession (A. 28). The police officer issued an appropriate citation (A. 28, 32), arrested Montrym, and escorted him to the station house.

Upon arrival Montrym refused to take a breathalyzer test.[4] Massachusetts General Laws c. 90, § 24(1)(f), pre-

[4] In the district court Montrym alleged that police did not inform him of the mandatory 90-day license suspension for refusal of the test (A. 7). Two police officers signed under penalties of perjury a contemporaneous report of Montrym's refusal despite prior notice of the suspension penalty (A. 40-41). In the course of its decision, the lower court treated that factual question as unsettled, 429 F. Supp. 393, 395, and did not involve it in the rationale for invalidation of the statute. Thus we assume that the court regarded the provision as unconstitutional even with a proper warning to an arrested driver.

scribes the following police procedure in the administration of the breathalyzer test. First, police must inform a driver arrested for operating under the influence of intoxicating liquor of the 90-day license suspension imposed for refusal of the test. The police officer receiving the refusal must then immediately prepare a written Report of Refusal to Submit to a Chemical Test. The Report of Refusal must state (1) the grounds for the officer's belief that the arrestee had been driving under the influence, (2) the fact of the arrest, and (3) the refusal of the test. The Report must be sworn to under the penalties of perjury by the police officer receiving the refusal. It must be endorsed by a witness to the refusal. And it must be further endorsed by the appropriate police chief or designated superior officer. The police must then send the Report "forthwith" to the Registrar who upon receipt must suspend the driver's license.

In the case of Montrym, the police described the grounds for their belief that he was driving under the influence: "A strong odor of an alcoholic beverage emitted from his person, he was glassy eyed and unsteady on his feet and he had to hold onto the [street] marker to maintain his balance, also spoke in a slurred fashion" (A. 41). Their Report also recounted that Montrym had been informed of the 90-day license suspension for refusal and that he had nonetheless declined the test at 8:45 p.m. (A. 41). As required by the challenged statute, the officer offering the test and a witnessing officer signed the Report under penalties of perjury and a superior officer endorsed it (A. 41). In compliance with the statute, the police administered no test

and forwarded the Report of Refusal to the Registrar (see A. 16-17, 29).

Further events at the station house on the evening of arrest have not been reduced to a stipulation or finding of fact.[5] Montrym submitted an affidavit in subsequent state court proceedings and filed a copy of it in the district court. In it he acknowledged a refusal of the test for reason of his unawareness of the automatic license suspension (A. 38-39). He recited further that his attorney had arrived at the station at approximately 9:05 p.m. and had advised him to take the test (A. 39); that he had then requested the test (A. 39); but that the police had thereafter refused to administer it (A. 39).

On June 2, 1976, the appropriate Massachusetts district court held a hearing on the criminal complaint charging Montrym with operating under the influence of intoxicating liquor, driving to endanger, and failing to have his registration in his possession (A. 28, 34-35). The state court found Montrym guilty of nonpossession of his registration, and not guilty of the charge of driving to endanger (A. 28). That court dismissed the charge of driving under the influence and as grounds cited Montrym's affidavit account of the police refusal to administer the breathalyzer after he had changed his mind upon advice of counsel (A. 28, 33).

On May 25 the Registrar had received the Report of Refusal (A. 29) and on June 7 he notified Montrym of the suspension of his license (A. 29, 42, 44-45). On that day Montrym's attorney wrote to the Massachusetts Board of Appeal on Motor Vehicle Liability Policies and Bonds

[5] The district court acknowledged the uncertainty of the facts beyond that point and did not consider them in its decision. 429 F. Supp. 393, 395.

(Board of Appeal) to request a hearing in appeal from the license suspension (A. 29).[6]

Montrym surrendered his license to the Registrar on June 8 (A. 29). At the time of surrender he had available an immediate statutory[7] hearing at which he was entitled

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[6] All persons aggrieved by an action of the Registrar may appeal within 10 days to that Board and receive a *de novo* evidentiary hearing. However, an appeal may not operate to stay any action of the Registrar (A. 30).

The governing statute, Massachusetts General Laws, c. 90, § 28, provides in full as follows:

> Any person aggrieved by a ruling or decision of the registrar may, within ten days thereafter, appeal from such ruling or decision to the board of appeal on motor vehicle liability policies and bonds created by section eight A of chapter twenty-six, which board may, after a hearing, order such ruling or decision to be affirmed, modified or annulled; but no such appeal shall operate to stay any ruling or decision of the registrar. In the administration of the laws and regulations relative to motor vehicles, the registrar, or any person by him authorized, may summon witnesses in behalf of the commonwealth and may administer oaths and take testimony. The board or the registrar may also cause depositions to be taken, and may order the production of books, papers, agreements and documents. Any person who swears or affirms falsely in regard to any matter or thing respecting which an oath or affirmation is required by the board or the registrar or by this chapter shall be deemed guilty of perjury. The fees for the attendance and travel of witnesses shall be the same as for witnesses in civil actions before the courts, and shall be paid by the commonwealth upon the certificate of the registrar filed with the comptroller. The supreme judicial or superior court may, upon the application of the board or the registrar, enforce all lawful orders of the board or the registrar under this section.

[7] Massachusetts General Laws, c. 90, § 24(1)(g), operating in conjunction with the challenged statute, provides in full as follows:

> Any person whose license, permit or right to operate has been suspended under paragraph (*f*) shall be entitled to a hearing before the

to representation by counsel and at which he could challenge the facial sufficiency of the Report of Refusal and its factual statements of probable cause, arrest, and refusal. Upon the request of a licensee, a Registry hearing officer will adjourn the hearing to permit police officers or other witnesses to be brought in for questioning, or for the submission of affidavits and counter affidavits, or for his own interview of witnesses in the field (A. 30). At the hearing the presiding officer, the licensee, and the licensee's attorney may question witnesses (A. 30). A licensee receiving an adverse decision may appeal to the Board of Appeal (A. 30).

Montrym did not use this hearing process at the time of license surrender on June 8. Instead, he pursued his June 7 request to the Board of Appeal for a hearing upon the initial suspension (A. 29, 46-47). On June 24 the Board notified him that he would receive a full hearing on July 6 (A. 30, 49). On July 2 Montrym commenced the present action, and then forwent the hearing before the Board of Appeal (A. 1, 30). On July 9 the Registrar assented to the temporary restraining order of the district court reinstating Montrym's license (A. 23). The parties then proceeded to litigate the general validity of the implied consent statute.

> registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have a right of access as invitees or licensees, (2) was such person placed under arrest, and (3) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate.

Summary of Argument.

The Massachusetts implied consent law, M.G.L. c. 90, § 24(1)(*f*), plays a crucial part in the Commonwealth's legislative scheme to deter, identify, reform and punish drunken drivers. That provision induces motorists arrested for driving under the influence of intoxicating liquor to submit to a chemical test by imposition of a mandatory 90-day license suspension for refusal of the test. The blood or breath test yields objective and usually conclusive evidence incriminating or exculpating the suspected motorist. According to his prior record, a convicted driver may face a variety of punitive and rehabilitative sanctions. These include a fine, brief confinement, and more typically a license revocation of at least one year for a first-time offender or at least five years for a prior offender. In the alternative, local courts retain discretion to place first-time offenders on probation on condition of their treatment in driver alcohol education programs or more basic alcohol rehabilitation programs. The prior consent process generates the evidence essential to trigger this entire remedial scheme of deterrence, punishment, and therapy (pp. 13-18).

The Massachusetts law satisfies the due process standards for a prior hearing opportunity announced by the Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and applied in *Dixon* v. *Love*, 431 U.S. 105, 112-115 (1977). First, the private interest in an individual driver's license deprived by government action is not so substantial as to command a prior evidentiary hearing (pp. 19-25). Second, the risk of an erroneous deprivation of the license is minimized by Massachusetts procedures of (1) an evidentiary hearing commencing on the same day as the surrender of the license, and (2) a reasonably prompt subsequent *de*

novo hearing before an administrative board of appeal (pp. 25-30). Third, the countervailing public purpose is compelling: the prevention of death, injury and damage upon the public highways; and the efficient and accurate administration of highway laws in both its courts and Registry of Motor Vehicles (pp. 30-35).

Argument.

I. Introduction: The Massachusetts Implied Consent Provision is an Important Element of a Comprehensive Legislative Scheme to Deter, Correct and Punish Intoxicated Driving.

It is helpful at the outset to place the challenged statute in the full perspective of Massachusetts legislation governing intoxicated driving upon its public highways. In the exercise of this traditional police power, the Legislature has constructed a network of deterrent, rehabilitative, and punitive sanctions to identify and to remove the drunken driver from the roads. That scheme respects the individual's need for a driving license, his possible problem of dependence upon alcohol, and the public's right to safety. For its administration, the Legislature has vested the state courts with broad discretion for the application of separate or combined sanctions to the circumstances of individual cases. We shall briefly describe this overall program and the integral function of the breathalyzer test within it. We shall then turn to due process analysis of the implied consent provision under the light of the governing case law.

A. *Deterrent and Punitive Provisions.*

Massachusetts law creates and punishes the crime of driving under the influence of intoxicating liquor by a fine of not less than $35 nor more than $1,000; or by imprisonment for not less than two weeks nor more than two years; or by both such fine and imprisonment. Massachusetts General Laws, c. 90, § 24(1)(a).[8] In addition, a court must immediately report a conviction of driving under the influence to the Registrar, who, in turn, must immediately revoke the convicted driver's license. No appeal or motion for new trial may stay the revocation. M.G.L. c. 90, § 24(1)(b).[9]

The duration of the automatic revocation will vary according to the driver's history. If a driver has not experienced a previous conviction for operating under the influence of liquor or other proscribed substances during the preceding six years, the revocation will last at least one year. If the driver has incurred such a conviction during the preceding six years, the revocation must run for at least five years. Finally, if the Registrar determines, upon investigation and hearing, that the convicted driver caused an accident resulting in a fatality, the revocation must last for at least 10 years. M.G.L. c. 90, § 24 (1)(c).[10]

In the prosecution of the charge of driving under the influence, evidence of percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a clinical test or analysis of his breath, is admissible as evidence of intoxication. Evidence of refusal

[8] M.G.L. c. 90, § 24(1)(a), is reproduced as Appendix A hereto.

[9] M.G.L. c. 90, § 24(1)(b), is reproduced as Appendix B hereto.

[10] M.G.L. c. 90, § 24(1)(c), is reproduced as Appendix C hereto.

to submit to a test is not admissible in any civil or criminal proceeding against the driver. If the test shows a percentage of five one-hundredths or less, the presumption arises that the defendant was not under the influence of intoxicating liquor, and he must be released from custody immediately. If the test shows a percentage of more than five one-hundredths but less than ten one-hundredths, no presumption arises. And, if the test shows a percentage of ten one-hundredths or more, a presumption will arise that the driver was operating under the influence of intoxicating liquor. M.G.L. c. 90, § 24(1)(e).[11]

To induce arrested drivers to submit to the breath or blood test, the implied consent measure itself imposes the automatic 90-day license suspension as a sanction against refusal. M.G.L. c. 90, § 24(1)(f). Integrally with that provision, the succeeding section provides for any driver refusing the test a hearing before the Registrar on the issues (1) whether the police had reasonable grounds for arrest for operating under the influence; (2) whether the driver was placed under arrest; and (3) whether he refused the test. If, after such a hearing, the Registrar finds any one of these issues in the negative, he must reinstate the license. M.G.L. c. 90, § 24(1)(g).[12] This "same day" hearing begins at the time of the driver's delivery of his license to the Registrar. The driver may have the assistance of counsel. The Registry hearing officer will continue the hearing at the request of the driver in order to bring in police officers or other witnesses for questioning, to receive affidavits, and to interview witnesses in the field (A. 30).

[11] M.G.L. c. 90, § 24(1)(e), is reproduced as Appendix D hereto.

[12] M.G.L. c. 90, § 24(1)(g), is fully set out in note 7, *supra*.

B. *Rehabilitative Provisions.*

In 1974 and 1975 the Legislature supplemented these traditional measures with alternate corrective programs for drivers convicted of operating under the influence. It conferred discretion upon the state trial courts to place a convicted driver on probation for one year on condition of his voluntary enrollment in an alcoholic treatment or rehabilitative program, or both. M.G.L. c. 90, § 24D.[13] The courts retained discretion to order such probation in addition to the traditional penalties and in addition to any conditions imposed for a suspended sentence. To qualify for probation, a convicted driver must cooperate in an investigation of his case by the court probation staff. The staff must file a pre-disposition report of the case with the judge. It will include a copy of the operator's driving record and any recommendations of the Registrar concerning early reinstatement of his license. After disposition, a supervising court probation officer must maintain a current written report to include the driver's participation in a prescribed treatment or rehabilitative program and his ongoing drinking and driving behavior. Of the two classes of programs, the Division of Alcoholism within the Massachusetts Department of Public Health administers the driver alcohol education programs; and either public or private institutions may administer the more basic alcohol treatment and rehabilitative programs.

Finally, a state court after a trial upon the charge of driving under the influence may, in its discretion, continue a case without a finding of guilt and place a driver on one-year probation if he cooperates in an investigation of his drinking problem and consents to participate in a driver

[13] M.G.L. c. 90, § 24D, is reproduced as Appendix E hereto.

alcohol education program or alcohol treatment program. M.G.L. c. 90, § 24E.[14] If the court continues a case without a finding, it must hold a hearing between 60 and 90 days later to review the driver's performance in the assigned program and to consider dismissal of the charge. A probation officer must submit a written report including an evaluation by the assigned program's supervisor. And the Registrar must submit a report of the driver's interim driving record. If the court is satisfied of the driver's completion of, or compliance with the program, it may dismiss the charge or it may order a later hearing. At the same time, the supervising probation officer must file with the court a written report of a driver's unsatisfactory compliance with an assigned program or of driving behavior constituting a threat to the public safety. The court must hold an immediate hearing on the report. If it finds noncompliance with an assigned program or conduct threatening the public safety, it must order license revocation forthwith and so notify the Registrar. The revocation will last for at least the remainder of the probation year. The driver must then reapply for a license.

The rehabilitative programs are now beginning to yield data evaluating their efficacy. In his first comprehensive report to the Governor and Legislature, the Massachusetts Director of the Division of Alcoholism, responsible for the administration of the Driver Alcohol Education Program, observed a substantially lower rate of recidivism among

[14] M.G.L. c. 90, § 24E, is reproduced as Appendix F hereto.

Operators whose driving under the influence has caused a death are not eligible for the described probation and license retention. *Id.*, first paragraph.

Program graduates.[15] Before implementation of the Driver Alcohol Education Program, the rate of recidivism for drunk driving offenses was approximately 20 per cent. For program graduates, the courts' probation offices have indicated a rate well under 10 per cent.[16] At the same time the drop-out rate from the Education Program has remained low, again under 10 per cent.[17] Further, the Director reported evidence that the Program experience had caused a marked reduction in drinking behavior among its graduates.[18]

The breath or blood test is pivotal for the success of both the punitive and the rehabilitative programs. Each set of processes is triggered by a conviction or, in the instance of a continuance without a finding and probation, the certain prospect of a conviction. In the overwhelming majority of cases, a conviction will turn upon the objective evidence of the breathalyzer test. Submission to the test has rested upon the prompt and automatic 90-day suspension for refusal. Until the decision below, Massachusetts law and the popular awareness of that law had assured a general acceptance of the test and the operation of the ensuing punitive and corrective programs.[19]

[15] E. Blacker, Ph.D., Director, Division of Alcoholism, Massachusetts Department of Public Health, *A Report to the Governor and the General Court on the Driver Alcohol Education Program* (April, 1978), 22.

[16] Office of the Commissioner of Probation, *Preliminary Report to the Division of Alcoholism, 1977* (as required by M.G.L. c. 90, § 24D, final paragraph).

[17] *Id.*

[18] E. Blacker, *supra* note 15 at 23, 24.

[19] In fiscal 1976, the Massachusetts courts processed 17,735 cases of operating under the influence of intoxicating liquor. Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1976.* It is estimated that about 300 arrestees per month, or 3,600 per year, refuse the chemical test. See 438 F. Supp. 1157, 1165 (opinion of the dissenting judge). Approximately 80 per cent of arrestees, then, accepted the test.

II. The Massachusetts Implied Consent Law Satisfies Due Process Because it Supplies a Prompt and Adequate Hearing Opportunity to a Driver Disputing his Refusal of a Chemical Test.

The parties and the judges of the district court have waged the argument of the present case within the boundaries of the three general criteria for a prior hearing announced by the Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and reaffirmed by it in *Dixon* v. *Love*, 431 U.S. 105, 112-113 (1977). When the government acts to deprive a person of a liberty or property interest,

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[20]

[20] Other decisions have suggested a possible fourth criterion: the adequacy of a subsequent hearing. See *Goss* v. *Lopez*, 419 U.S. 565, 582-583 (1975) (suspension of public school students); *Arnett* v. *Kennedy*, 416 U.S. 134, 157-158 (1974) (benefits of terminated government employees); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 610 (1974) (reclamation of personal property sequestered *ex parte* by the selling creditor).

If the availability of a subsequent hearing is relevant in the setting of the deprivation of a driver's license, the "same day" hearing of M.G.L. c. 90, § 24(1)(g), and the subsequent de novo hearing before the Board of Appeal under M.G.L. c. 90, § 28, provide reasonably prompt alternate hearing opportunities and support the constitutionality of the Massachusetts implied consent provision.

Two decisions of this Court have received paramount attention. The first is *Bell* v. *Burson*, 402 U.S. 535 (1971), in which the Court held the Georgia Motor Vehicle Safety Responsibility Act to violate due process. The statute required the suspension of the driver's license of an uninsured motorist involved in an accident unless he posted security to cover the amount claimed by an aggrieved party. The statute provided for a pre-suspension hearing which excluded consideration of the motorist's fault or liability for the accident. The Court concluded that the elimination of this factor from the prior hearing violated due process.

The second decision is *Dixon* v. *Love*, 431 U.S. 105 (1977), in which the Court held the Illinois habitual offender law to comply with due process. That law empowered the Illinois Secretary of State to revoke or suspend the licenses of drivers "without preliminary hearing upon a showing by his records or other sufficient evidence" that a driver's conduct fell into any one of 18 enumerated categories, including one for drivers whose records showed a "lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway." By regulation the Secretary had devised a point system calibrating the severity and number of traffic offenses with the appropriate length of suspension or revocation. He received records of convictions from the courts, computed the drivers' point totals, and summarily suspended or revoked habitual offenders' licenses at appropriate point levels. The statute provided a subsequent evidentiary hearing for motorists wishing to dispute facts other than the validity of the underlying convictions. This Court held that the denial of a pre-suspension or pre-revocation hearing for a driver did not violate due process.

The Massachusetts implied consent process of M.G.L. c. 90, § 24(1)(f), satisfies the general criteria of the *Mathews* decision and compares favorably with the particular facts of the *Bell* and *Dixon* cases. An important and distinctive feature of that process is the operation of the companion provision, M.G.L. c. 90, § 24(1)(g), guaranteeing an affected driver a Registry hearing to begin on the same day as license surrender (A. 30) on the issues of (1) probable cause, (2) arrest, and (3) refusal of the breathalyzer test, as prerequisite facts for a 90-day suspension. The present appeal presents the Court with the question whether states must go further, and extend a hearing, both prior and evidentiary, in the administration of their implied consent laws.[21]

A. *An Individual's Private Interest in a Driver's License is Not so Substantial as to Require Universally a Full Evidentiary Hearing Prior to its Suspension.*

Since the Court's decision of *Bell* v. *Burson*, 402 U.S. 535, 539 (1971), it has been settled that the individual's

[21] As of June, 1978, twelve other states enforce implied consent provisions for the suspension of a driver's license without a prior hearing. See Ala. Code Tit. 36, § 154 (Supp. 1973); Alaska Stat. § 28.35.031 (1975); Del. Code Tit. 21, § 2742 (1974); Idaho Rev. Code § 49-352 (1975) (covering licenses of nonresidents); Ind. Code Ann. Tit. 9, § 4-4.5-4 (1975); Me. Rev. Stat. Tit. 29, § 1312(2) (Supp. 1976); Miss. Code Ann. §§ 63-11-21 through 23 (1972); Mo. Ann. Stat. § 564.441; Mont. Rev. Code Ann. § 32.2142.1-2 (Supp. 1972); N.H. Rev. Stat. Ann. § 262-A:69-e (Supp. 1972); N.M. Stat. Ann. § 64-22-2.12 (1975); R.I. Gen. Laws Ann. § 31-27-2.1 (1974).

The state courts have had occasion to sustain four of these statutes against due process attack. See *Jones* v. *Schaffner*, 509 S.W. 2d 72 (Mo. 1974); *Daneault* v. *Clarke*, 113 N.H. 481 (1973); *In re McCain*, 84 N.M. 657 (1973); *Broughton* v. *Warren*, 281 A. 2d 625 (Del. Ch. 1971) (upholding automatic suspension upon conviction of other driving offenses). See also *Opinion of the Justices*, 255 A. 2d 643 (Me. 1969).

liberty or property interest in a driver's license is entitled to some form of due process protection. "Suspension of issued [driver's] licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* However, the timing and the scope of a necessary due process hearing can vary with the circumstances so long as it is "'appropriate to the nature of the case.'" *Id.*, 542, quoting from *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Bell* the Court found a prior hearing necessary because the Georgia financial responsibility law premised license suspension upon a bare preexisting assumption of a driver's fault or liability for an accident. Under the Georgia law this predicate for the license suspension received absolutely no process or attention. Thus the Court insisted that an assumption of liability have some premise in fact established by a previous hearing. *Bell* v. *Burson*, 402 U.S. 535, 542 (1971). While the timing of the hearing must be prior, its scope could vary from an administrative probable cause determination to a *de novo* judicial proceeding. *Id.*, 543. It need not be a full evidentiary exercise.

In *Dixon* v. *Love*, 431 U.S. 105 (1977), the Court defined more generally the constitutional value of a driver's license. It compared the license interest to social security[22] and social insurance[23] payments and found it less than a matter of subsistence for the ordinary driver. *Id.*, 113. The Court also measured the value of the license by the impact of its loss upon those drivers specially dependent upon it for livelihood or hardship purposes. Under that standard it approved of

[22] Citing *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

[23] Citing *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970).

the Illinois statutory provisions enabling a commercial driver to submit an affidavit or to request an administrative hearing in application for relief in the form of a limited permit to drive commercially only.[24] Similarly, a driver facing "undue hardship" from suspension or revocation could apply for a limited permit to drive between his residence and place of employment or within other proper limits.[25] It is significant that these Illinois provisions (1) make hardship relief available only *after* suspension, (2) place the burden of showing eligibility for relief upon the applicant, and (3) fail to guarantee any deadline for a hearing upon, or determination of, relief. The possible length of a wrongful deprivation is an important factor in assessing the impact of official action on the affected private interest. *Mathews* v. *Eldridge*, 424 U.S. 319, 341. In Illinois a hearing, once requested, need not be *scheduled* for up to 20 days after receipt of the request and then need only be set for a date as "early as practical."[26] As the Circuit Judge member of the three-judge panel pointed out in his dissent from the second decision below, these procedures may consume "some time" during which the driver is deprived of his license.[27] This delay did not offend due process. The Court concluded that "the nature of the private interest here is not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action'" (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 343). *Id.*, 431 U.S. 105, 113.

The same principle should govern the driver's license interest at stake in the operation of the Massachusetts implied

[24] 431 U.S. 105, 110 n. 7.

[25] *Id.*

[26] Ill. Rev. Stat. c. 95-1/2, § 2-118(a).

[27] 438 F. Supp. 1157, 1163 (1977).

consent process. First, this Court's characterization of the license interest in *Dixon* appears to have been a general one. It did not turn upon the hardship exemptions afforded by the Illinois scheme. What is more, due process doctrine takes shape from the general, and not the unusual, case. *Mathews* v. *Eldridge*, 424 U.S. 319, 344. The Court was not basing a constitutional assessment of the license interest upon the exceptional hardship case of the professional truck, bus, or taxi driver, but rather upon the usual suspension of an offending driver confronting inconvenience rather than hardship.[28]

Second, the Massachusetts procedures for challenging the license suspension are more inclusive and expeditious than those in *Dixon*. M.G.L. c. 90, § 24(1)(g). The companion procedural provision of the implied consent law provides anyone, not merely hardship applicants, with the opportunity for an immediate hearing on the issues of probable cause for arrest, arrest, and refusal of the test. The hearing can begin before a Registry hearing officer on the day of license surrender and can continue as necessary for the collection of evidence. The applicant may be represented by counsel. In addition to the "same day" hearing, a driver may choose to appeal his suspension directly to the Board of Appeal for a full *de novo* evidentiary proceeding, in accordance with M.G.L. c. 90, § 28.[29]

[28] In their second decision the majority of the district court tried to distinguish the treatment afforded the license interest by the Massachusetts implied consent law from that of the Illinois habitual offender law on the basis of the latter's hardship exemptions. "The opportunity for such relief was a controlling factor in the Court's [*Dixon*] decision." 438 F. Supp. 1157, 1159. This interpretation of the Court's language seems plainly wrong, as the dissenting judge demonstrates, 438 F. Supp. 1157, 1162-1164.

[29] See note 6, *supra*.

Montrym chose the Board of Appeal route, and his experience is some measure of the treatment of the license interest by this alternate subsequent evidentiary hearing system. He requested a hearing on June 7, 1976; surrendered his license on June 8; and on June 24 received a hearing date of July 6. Notably, however, he did not pursue his administrative remedy at the Board. This course would have brought him, as a typical claimant, a hearing date 16 days, and a hearing itself 28 days into his suspension. These figures compare favorably with the constitutionally acceptable Illinois scheme providing a hearing date within 20 days and a hearing as soon as practical thereafter, and for hardship claimants only.

In short, the district court's language, coupled with the greater safeguards afforded here as compared with *Dixon*, make plain that the majority below assigned the driver's license a measure of importance in clear contradiction of the *Dixon* calculus.

B. *The Massachusetts Procedure Safeguards Against the Risk of an Erroneous License Suspension.*

The challenged statute prescribes a number of steps to assure the accuracy of a police report of a driver's refusal of the breathalyzer test. Even before the statutory procedure comes into play, certain inherent probabilities militate against an unwarranted license suspension. Often an objective event brings the police to the driver. Here, for example, Montrym was involved in a collision (A. 28). This undisputed accident was the occasion for the arrival of the police. They did not sift him out of the general traffic and initially stop him upon arguable grounds. Second, police must arrest and transport a suspected drunken driver to the station house for administration of the test (A. 38-39). They

do not offer or execute the test at the scene or in the heat of the confrontation and arrest. The arrest and the trip are not casual duty, but a significant interruption of ordinary police patrol activities. They are not likely to be undertaken lightly or without probable cause.

At the station house the statutory requirements begin. In the presence of a witness, an officer must inform the driver of the penalty of a 90-day suspension for refusal of the breathalyzer test. Upon refusal, the officer must immediately execute a written Report of Refusal (A. 40-41). The Report must set out (1) the grounds for the officer's belief that the arrestee had been operating under the influence, (2) the fact of the arrest, and (3) the driver's refusal of the test. The specificity of the grounds should assure further reliability. In Montrym's case the arresting officer described the symptoms of intoxication:

> A strong odor of an alcoholic beverage emitted from his person, he was glassy eyed and unsteady on his feet and he had to hold onto the [street] marker to maintain his balance, also spoke in a slurred fashion (A. 41).

The witness to the refusal must endorse the Report. Both the officer receiving the refusal and the witness to it sign the Report under the penalties of perjury (A. 41). The police chief or a superior officer must endorse it. As the dissenting judge below stated, the refusal of the test is a "simple, objectively-ascertainable event."[30]

The majority of the district court regarded the risk of an erroneous license suspension as nonetheless significant because a suspension rests also upon the reasonableness of the

[30] 438 F. Supp. 1157, 1161.

grounds for arrest and upon the fact of the arrest. They concluded that such disputable issues required some kind of pre-suspension opportunity for response to police assertions, but not necessarily a full evidentiary hearing.[31] This reasoning is questionable in several respects. First, the statute makes simply the informed refusal of the test the ground for suspension. Its pertinent language provides:

> If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles . . . shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. . . . Upon receipt of such report, the registrar shall suspend any license or permit to operate . . ..

Refusal alone may well be the basis for suspension on the ground that the evidence of the test is a valuable instrument for determination of the truth, both inculpatory and exculpatory. The objective general interest of both the state and the individual in such evidence may independently justify the threat of the license suspension. For example, Montrym has subsequently argued that the refusal of the police to give him a belated test denied him exculpatory evidence (A. 37).

[31] 429 F. Supp. 393, 398-399; 438 F. Supp. 1157, 1160-1161.
Consequently, the majority distinguished the likelihood of error in *Dixon* as less because the license sanctions there rested upon the *records* of facts previously adjudicated in the courts, and not upon the correctness of the facts themselves. 438 F. Supp. 1157, 1160-1161.

Even if the reasonableness and the fact of arrest are disputable bases of the license suspension, the district court majority are unrealistic in their general suggestion that some informal process short of an evidentiary hearing will satisfactorily resolve them. In their first decision the majority suggested that the "same day" hearing was acceptable in its scope but that it should be advanced from a contemporaneous to a prior opportunity to be heard because of the likelihood of delays, most probably in the collection of evidence.[32] So long as it came before suspension, the court was willing to approve "a minimal opportunity to be heard"[33] or "a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust."[34] Perhaps out of recognition that a full prior evidentiary exercise would be onerous and would indefinitely postpone the suspension sanction, Montrym also has pressed for some mere opportunity to respond.[35] The utility of such an opportunity is

[32] 429 F. Supp. 393, 400.

[33] *Id.*

[34] 438 F. Supp. 1157, 1160.

[35] Supplemental Brief in Support of Appellee's Motion to Affirm, 8 n. 4:

> Montrym does not maintain that the Constitution requires a pre-suspension hearing before termination. His position is simply that Massachusetts must afford him "an *opportunity to respond* or to present his side of the story," *Goss* v. *Lopez*, 419 U.S. 565, 480, 583-584 [appellee's emphasis].

The dissenting judge's treatment of this argument is far more practical:

> Individuals such as plaintiff who wish to assert a factually disputed claim will gain nothing from a non-evidentiary hearing. All a non-evidentiary hearing prior to suspension would do is cure simple mix-ups. But this function is perfectly well accomplished by the non-evidentiary hearing which a licensee may obtain the day he surrenders his license. What Massachusetts now provides — the opportunity for a full hearing beginning the very day the driver hands in his license — seems to me to strike a reasonable balance between the individual's interests and those of the state. 438 F. Supp. 1157, 1164.

apparent for clear and correctible mistakes, such as clerical errors in the suspension papers. However, the "same day" hearing already functions for these purposes. For example, Montrym on the day of license surrender could have presented to a Registry hearing officer a certified copy of the state court's finding of the police denial of the test and its dismissal of the charge of operating under the influence (A. 33). But the utility of such a hearing is fictitious for such ultimate issues as the probable cause for arrest or a closely disputed question of refusal. And one may reasonably expect these issues to constitute the great majority of cases.[36]

The "same day" hearing includes the essentials of fairness for the occasion of the license surrender, including an unbiased tribunal, notice of the proposed action and of grounds, opportunity to present evidence and argument, and, perhaps most importantly, the assistance of counsel. See Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1279-1291 (1975).

[36] As the dissenting judge observed below:

> To be sure, a driver might assert that the police had required the test after arresting him without cause. But it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest; if improperly arrested, he would take the test and sue for false arrest, not put his license in jeopardy. And if the licensee feels that he is the victim of false police affidavits, he would be raising a claim to which the Illinois point system is equally vulnerable. If a police officer or bureaucrat is willing deliberately to commit perjury, the citizen's ultimate recourse must be under various state and federal tort and criminal statutes. In 999 cases out of 1,000 I cannot see what there will ever be to try concerning the fact of refusal to take a chemical or blood test. 438 F. Supp. 1157, 1163-1164.

For clearly visible and curable errors, the existing "same day" hearing of M.G.L. c. 90, § 24(1)(g), at the time of license surrender continues to be available. For the more difficult questions of fact, or law-and-fact, the post-suspension *de novo* hearing before the Board of Appeal under M.G.L. c. 90, § 28, is appropriate. Consequently, the informal nonevidentiary hearing opportunity proposed by the appellant and by the majority below will not improve upon present procedure and is "unlikely to have significant value in reducing the number of erroneous deprivations." *Dixon* v. *Love*, 431 U.S. 105, 114. The record in this case contains no indication of an unusual degree of error in the present process. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 346-347 (1976) (consideration of the reversal rate of appealed cases). The existing procedures will be reliable and fair in the vast majority of cases and therefore satisfy due process. *Id.*, 344.

C. *The Massachusetts Implied Consent Procedure Serves the Deterrence, Punishment and Rehabilitation of Unsafe Drivers and the Efficiency of its Courts and Motor Vehicle Registry.*

Implied consent laws serve the obvious purpose of highway safety. This Court has given special respect to "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." *Dixon* v. *Love*, 431 U.S. 105, 114. More particularly, this purpose "fully distinguishes *Bell* v. *Burson*, . . . where the 'only purpose' of the Georgia statute there under consideration was 'to obtain security from which to pay any judgments against the licensee resulting from the accident.'" *Id.* It has cited the need "to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the

safety of others" as ample justification for an initial summary decision. *Id.*, 114-115.

The same public purpose inheres particularly in the treatment of drunken drivers. Authoritative national estimates have held drinking drivers responsible for as much as 50 per cent of all traffic deaths and accidents.[37] A federal study has indicated that fatal accidents result not so much from "social drinking," but rather from the conduct of chronic "problem drinkers."[38]

The Massachusetts experience for the period 1972 through 1975 shows a substantial increase in the percentage of alcohol related fatalities (A. 70):

Year	Total Fatalities	Alcohol Related Fatalities	Percentage of Alcohol Related Fatalities
1972	991	204	20.6%
1973	1,010	254	25.1%
1974	961	313	32.6%
1975	884	283	32.0%

Over that four-year span, alcohol related deaths rose by 38.7 per cent (A. 68, 70). In the view of the Acting Registrar in 1977, an employee of that agency for 31 years, the mandatory license suspension for refusal of the breathalyzer test constituted the most effective measure available for treatment of drunken driving (A. 69).

In response to the problem, Massachusetts has developed the system of punitive and rehabilitative sanctions described

[37] See generally, The United States Department of Transportation, *1968 Alcohol and Highway Safety Project.*

[38] United States Department of Transportation, *The Alcohol Safety Countermeasures Program* (Pamphlet) 2 (1971).

in Part I, *supra*. The tripwire for that entire scheme is the identification and conviction of the intoxicated driver, and especially the repeatedly intoxicated driver. The evidentiary role of the chemical test is crucial. The prospect of a prompt suspension, unavoidable through a prior-hearing regime, motivates the driver to submit to the breathalyzer test. The test yields objective and usually conclusive evidence on the charge of intoxicated driving. The objectivity of the evidence is doubly valuable: it promotes the identification of the guilty, and the exculpation of the innocent.[39] For the new offender, the evidence will lead to conviction and a one-year revocation of license or to probation and enrollment in a driver alcohol education program or alcohol treatment program. For the repeated offender, the evidence will lead to conviction and the five-year revocation of his license. Public awareness of the implied consent system may deter drunken driving. For, before he begins an intoxicated trip, a typical Massachusetts motorist, and especially a past offender, knows that detection presents hard choices: refusal of the test and the automatic 90-day suspension and possible subsequent conviction in any event; or acceptance of the test and of conclusive evidence leading to punishment or conviction, and the loss of grace accorded the first-time offender. All these benefits of highway safety — accurate evidence, license revocation, driver rehabilitation, and general deterrence — turn on the driver's inability to parry and temporize against the 90-day suspension through the medium of an automatic prior-hearing system.

[39] The dissenting judge below found it hard to imagine that a sober driver would refuse to take the test. 438 F. Supp. 1157, 1163. Montrym illustrates the point. He subsequently claimed in state court proceedings that the denial of his late request to take the test deprived him of the chance to exculpate himself (A. 37).

The majority of the district court questioned the importance of the implied consent process to highway safety in one particular. It reasoned that because a driver could temporarily preserve his license and presence on the road by submission to the test, however incriminating, the process did not urgently remove the dangerous driver for the sake of public safety. 429 F. Supp. 393, 397.[40] It doubted the government's claim of emergency as justification for a subsequent, rather than prior, hearing.

In this case the state relies upon the implied consent sanction not as a narrow emergency measure for instantaneous removal of the intoxicated driver from the road, but as a mechanism to advance a variety of deterrent, punitive, and rehabilitative measures. The sole treatment of the intoxicated driver, especially the first offender, need not be his immediate banishment from the highway. The existence of the implied consent process may still deter drunken driving; the reasonably prompt trial of drivers failing the test and having a prior record will bring the revocation of their licenses; and the probation and education of first-time offenders can both reform them and move them one considerable step closer to revocation. The government need not employ revocation in a rigidly juggernaut fashion in order to justify the refusal of a prior hearing.

[40] See also *Stone* v. *Kentucky Dept. of Transportation*, 379 F. Supp. 652, (E.D. Ky. 1974); *Chavez* v. *Campbell*, 397 F. Supp. 1285, 1287 (D. Ariz. 1973); *Holland* v. *Parker*, 354 F. Supp. 196, 202 (D.S.D., C.D. 1973).

Each of those district courts, in reliance upon *Fuentes* v. *Shevin*, 407 U.S. 67, 90-92 (1972), adopted the view that the government could omit a prior hearing only in emergency situations. *Bell* v. *Burson*, 402 U.S. 535, 542, also suggested that rule for the treatment of the driver's license. Since those decisions, the holdings of *Mathews* and *Dixon* have supplied a different and controlling rationale for the requirement of a prior hearing.

In addition to such positive objectives, the state may fairly rely upon freedom from fiscal and administrative burdens as permitted by the present suspension system. A number of efficiencies accruing to the government from the present law would most certainly disappear with the introduction of a compulsory prior hearing system. In this regard, the Court's response to the prior hearing claim in *Dixon* v. *Love*, 431 U.S. 105, 114, is once again apt:

> Finally, the substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case. Giving licensees the choice thus automatically to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full administrative hearings.

A prior hearing system, even nonevidentiary, would inflict an enormous administrative burden upon the Registry. Drivers facing suspension would typically employ it. The number of drivers willing to decline the breathalyzer will tend to grow with the awareness of that option. In fiscal 1976 the Massachusetts local courts processed 17,735 charges of operating under the influence of intoxicating liquor.[41] This figure had risen from 16,290 in fiscal 1975[42] and from 12,861 in fiscal 1974.[43] By contrast, the incremental fact-

[41] Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1976.*

[42] Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1975.*

[43] Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1974.*

finding value of a nonevidentiary hearing will be small. Nonetheless, additional Registry hearing officers will be necessary to conduct the hearings. From drivers bent on the preservation of their licenses, those officers will confront leniency pleas, delays, persuasion, and factual claims requiring full-blown evidentiary hearings.

In the courts, to the extent that more drivers resist the test in reliance upon a prior hearing, its conclusive evidentiary value will be lost. Trials will become more frequent and will consume more time and police testimony in lieu of the test results. The number of guilty pleas will decline. The caseload of the local courts will mount.

An appreciable improvement of such a nonevidentiary prior hearing system upon the present "same day" hearing opportunity is unlikely. Its proposed benefits simply do not justify its considerable administrative burdens, let alone its detriment to the positive goal of highway safety.

Conclusion.

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
Assistant Attorney General,
MITCHELL J. SIKORA, JR.,
Assistant Attorney General,
STEVEN A. RUSCONI,
Assistant Attorney General,

Department of the Attorney General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1032

Dated: June 29, 1978.

Appendix A.

Mass. Gen. Laws, c. 90, § 24(1)(a) [definition and punishment of the offense of driving under the influence of intoxicating liquor]:

> Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, shall be punished by a fine of not less than thirty-five nor more than one thousand dollars, or by imprisonment for not less than two weeks nor more than two years, or both such fine and imprisonment. A court or magistrate, before imposing sentence upon a person found guilty of a violation of this paragraph shall ascertain by inquiry of the office of the registrar or of the board of probation, or of both said offices, what records or other information said office has tending to show that said person has been convicted of a like offense by a court or magistrate of the commonwealth within a period of six years immediately preceding the commission of the offense with which he is charged.

Appendix B.

Mass. Gen. Laws c. 90, § 24(1)(b) [automatic revocation of driver's license for conviction of driving under the influence of intoxicating liquor]:

> A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who shall revoke immediately the license or the right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate.

Appendix C.

Mass. Gen. Laws c. 90, § 24(1)(c) [duration of license revocation for conviction of driving under the influence of intoxicating liquor]:

> The registrar, after having revoked the license or the right to operate of any person under the preceding paragraph of this section, shall not issue a new license or reinstate the right to operate to such person, except in his discretion if the prosecution of such person has terminated in favor of the defendant, until five years after the date of revocation following a conviction of a violation of paragraph (*a*) hereof committed within six years after conviction of a violation of said paragraph, nor until one year after the date of revocation following a conviction of any violation of said paragraph other than one committed within six years as aforesaid, except as provided in section twenty-four D; but notwithstanding the foregoing, no new license shall be issued or right to operate be reinstated by the registrar to any person convicted of a violation of paragraph (*a*) of subdivision (1) of this section until ten years after the date of conviction in case the registrar determines upon investigation and after hearing that the action of the person so convicted in committing such offence caused an accident resulting in the death of another, nor at any time after a subsequent conviction of such an offence, whenever committed, in case the registrar determines in the manner aforesaid that the action of such person, in committing the offence of which he was so subsequently convicted, caused an accident resulting in the death of another.

Appendix D.

Mass. Gen. Laws c. 90, § 24(1)(e) [evidentiary value of breathalyzer test results]:

> In any prosecution for a violation of paragraph (1) (*a*) of this section, evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request, and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in any civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (*f*). Blood shall not be withdrawn from any such defendant for the purposes of any such test or analysis except by a physician or a registered nurse. If such evidence is that such percentage was five one hundredths or less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not

> be liable for false arrest, if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; if such evidence is that such percentage was more than five one hundredths but less than ten one hundredths, there shall be no presumption; and if such evidence is that such percentage was ten one hundredths or more, there shall be a presumption that such defendant was under the influence of intoxicating liquor. A certificate by a chemist of the department of public safety of the result of an analysis made by him of the percentage of alcohol in blood furnished him in accordance with the provisions of this paragraph by a police officer of any department, signed and sworn to by such chemist, shall be prima facie evidence of the percentage of alcohol in such blood.

Appendix E.

Mass. Gen. Laws c. 90, § 24D [probation of persons convicted of driving under the influence; driver alcohol education program; alcohol treatment and rehabilitation program]:

> Any person convicted of or charged with operating a motor vehicle while under the influence of intoxicating liquor may, if he consents, be placed on probation for one year and shall, as a condition of probation, be assigned to a driver alcohol education program as provided herein and, if deemed necessary by the court, to an alcohol treatment or rehabilitation program or to both as provided herein. Such order of probation shall be in addition to any penalties imposed as provided in paragraph (*a*) of subdivision (1) of section twenty-four and shall be in addition to any requirement imposed as a condition for any suspension of sentence.
>
> In order to qualify for disposition under this section, said person shall cooperate in an investigation conducted by the probation staff of the court for the supervision of cases of operating under the influence of intoxicating liquor in such manner as the commissioner of probation shall determine. After a conviction or any other finding, the case shall be continued for fourteen days for disposition, at which time a report shall be made to the judge.
>
> Said report shall be uniform in content and format throughout the commonwealth and shall include but shall not be limited to a copy of said person's driving record and other records obtained from the registrar, or other person designated by him, pertaining to said person's operation of a motor vehicle as well as any recommendation by the registrar as to whether said person should later be elibible for early reinstatement of his license. The court shall report the disposition or finding of any such case to the registrar. Following disposition, the probation officer supervising a person pursuant to the provisions of this section shall maintain a written and current report which shall include but shall not be limited to consideration of said person's participation in any program in which he has been placed as a condition of probation as well as to a consideration of his drinking and driving behavior.
>
> Driver alcohol education programs utilized under the provisions of this section shall be established and administered by the director of the division of alcoholism in consultation with the registrar and the secretary of public safety, and shall include but shall not be limited to instruction on driver improvement skills as part of the course content.
>
> Alcohol treatment, rehabilitation program or alcohol treatment and rehabilitation programs utilized under the provisions of this section shall include any public or private out-patient clinic, hospital, employer or union-sponsored program, self-help group, or any other organization, facility, service or program which the division of alcoholism has accepted as appropriate for the purposes of this section. The division shall prepare and publish annually a list of all such accepted alcohol treatment, rehabilitation programs and alcohol treatment and rehabilitation programs, shall make this list available upon request to members of the public, and shall from time to time furnish each court in the com-

monwealth, the registrar, and the secretary of public safety with a current copy of said list.

A fee of two hundred dollars shall be paid to the chief probation officer of each court by each person placed in a program of driver alcohol education and, if deemed necessary by the court, a program of alcohol treatment, rehabilitation, or alcohol treatment and rehabilitation pursuant to this section, and beginning December first, nineteen hundred and seventy-five all such fees shall be deposited with the state treasurer to be kept in a separate fund in the treasury for expenditure by the division of alcoholism subject to appropriation for the support of said program, provided further that from the fees received an amount not in excess of three hundred thousand dollars may be expended in fiscal year nineteen hundred and seventy-six without further appropriation. Until such date, the program fees which are paid to the chief probation officer of each court under this section shall be used in the determination of a court under contract or agreement with a public or private agency or facility or person to purchase the services of such agency, facility, or person for a program of driver alcohol education and alcohol treatment, rehabilitation pursuant to this section. No person may be excluded from said program for inability to pay the stated fee, provided that such person files an affidavit of indigency or inability to pay with the court within ten days of the date of disposition, that investigation by the probation officer confirms such indigency or establishes that the payment of such fee would cause a grave and serious hardship to such individual or to the family of such individual, and that the court enters a written finding thereof. Any facility or organization with a treatment or rehabilitation program or a treatment and rehabilitation program used hereunder shall be sub-

rogated to any public or private third-party payments which may be due for the cost of alcohol treatment, rehabilitation, or both.

The state treasurer may accept for the state for the purpose of driver alcohol education, treatment, or rehabilitation any gift or bequest of money or property and any grant, loan, service, payment of property from a governmental authority. Any such money received shall be deposited in the separate fund in the treasury for expenditure by the division of alcoholism subject to appropriation for the support of said driver alcohol education or alcohol treatment or rehabilitation programs in accordance with the conditions of the gift, grant, or loan without specific appropriation. Any federal legislation generating funds for driver alcohol education or treatment or rehabilitation shall be used by the division of alcoholism to the extent possible to support the purposes of this act.

The commissioner of probation shall report in writing at least once annually to the director of the division of alcoholism on the total number of persons who have received disposition hereunder and on the number of such persons who have been determined by the court to require alcohol treatment or rehabilitation, or both. Said commissioner and the chief justices of the district courts and the Boston municipal court shall make further written report at least once annually to said director on the resources available for alcohol treatment or rehabilitation, or alcohol treatment and rehabilitation, of alcohol-impaired drivers, which report shall evaluate the existing resources and shall make recommendation as to additional necessary resources. Said director shall take such reports into consideration in the development, implementation, and review of the

state's alcoholism plan and in the preparation of the division annual budget in a manner consistent with the Alcoholism Treatment and Rehabilitation Law.

Appendix F.

Mass. Gen. Laws c. 90, § 24E [early reinstatement of license for persons convicted of driving under the influence and placed on probation]:

> The provisions of section 24D and this section shall apply to persons convicted or charged with operating a motor vehicle while under the influence of intoxicating liquor. The provisions of this section shall not apply where notice from the registrar of intention to suspend or revoke a person's license or right to operate is pending prior to the date of complaint on the offense before the court nor to cases, where under paragraph (*c*) of subdivision (1) of section twenty-four, the violation is determined to have caused a death.
>
> In order to qualify for a disposition under this section such person shall, in the judgment of the court, have cooperated fully with the investigation as described in section twenty-four D and shall be and have been in full compliance with such order as the court may have made for a one year term of probation as provided therein, including participation in such driver alcohol education programs, alcohol treatment or alcohol treatment and rehabilitation programs as the court may have ordered.
>
> Nothing in this section shall be construed to prevent the exercise by a court of its authority under law to make any other disposition of a case of operating under the influence of intoxicating liquor.
>
> Where a person has been charged with operating a motor vehicle under the influence of intoxicating liquor, and where the case has been continued without a finding and such person has been placed on proba-

tion with his consent and where such person is qualified for disposition under this section, a hearing shall be held by the court at any time after sixty days but not later than ninety days from the date where the case has been continued without a finding to review such person's compliance with the program ordered as a condition of probation and to determine whether dismissal of the charge is warranted.

At said hearing the probation officer shall submit to the court a written report which shall include but shall not be limited to a written statement by the supervisor of any program of alcohol education and of any program of alcohol treatment, rehabilitation, or alcohol treatment and rehabilitation to which the court has assigned such person. Said statement shall consider such person's participation and attendance in each such court ordered program. The registrar shall submit a written report to the judge at said hearing regarding any entries made on said person's driving record in the period following placement in the program. If the judge finds sufficient basis to conclude that said person has satisfactorily completed or is satisfactorily complying with said program the judge may enter a dismissal of the charge. Appropriate orders relative to said person's participation in a program or relative to a later hearing may be made by the court at its hearing, subject to the duration of the one year term of probation.

The probation officer supervising a person pursuant to the provisions of this section shall make a written report to the court if such person has failed to satisfactorily comply with a court ordered program or if such person's operation of a motor vehicle constitutes a threat to the public safety. Upon receipt of such

report the court shall forthwith hold a hearing on the matter. If at such hearing the court shall determine that said person has failed to satisfactorily comply with said program or that said operation of a motor vehicle constitutes such a threat, the court shall forthwith notify the registrar of said finding and the registrar shall forthwith and without further hearing revoke said person's license or right to operate. Such revocation shall be for the remainder of the one year period from the date of revocation provided in paragraph (*c*) of subdivision (1) of section twenty-four. Said person shall thereafter be subject to the same conditions for issuance of a new license or right to operate as any person applying for a new license or right to operate following revocation as provided in paragraph (*c*) of subdivision (1) of section twenty-four.

Where an order of probation has been revoked by the court, the court shall forthwith so notify the registrar in writing and the registrar shall forthwith revoke said person's operators license or right to operate which was restored under this section and without further hearing.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEE

Robert W. Hagopian
ORION RESEARCH INC.
380 Putnam Avenue
Cambridge, MA 02139
(617) 864-5400

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IN THE
SUPREME COURT
OF THE UNITED STATES.

October Term, 1978.

No. 77-69.

ALAN MACKEY,
Registrar of Motor Vehicles
of the Commonwealth of
Massachusetts,
Appellant,

v.

DONALD E. MONTRYM et al,
Appellees.

On Appeal From the
United States District Court
for the District of
Massachusetts.

BRIEF FOR THE APPELLEE

STATUTES INVOLVED

The Registrar has set forth Massachusetts General Laws (G.L.) Ch. 90 §24(1)(f) under this section

in his brief. However, a proper understanding of the questions presented by this appeal cannot be obtained without a close examination of this section's counterpart, namely, §24(1)(g) which reads:

> Any person whose license, permit or right to operate has been suspended under paragraph (f) shall be entitled to a hearing before the registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have a right of access as invitees or licensees, (2) was such person placed under arrest, and (3) did such person refuse to submit to such test

> or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate.

QUESTIONS PRESENTED

A more accurate statement of the "Questions Presented" by this appeal is as follows:

1. Whether the one-sided "form affidavit" procedure under §24(1)(f) is sufficiently reliable to justify Massachusetts' suspending a motorist's license without affording him a prior opportunity to respond on the issues set forth in §24(1)(g)?

2. Whether the Registrar's post-termination procedures are a constitutionally permissible substitute to affording the motorist a pretermination opportunity to respond to the issues set forth under §24(1)(g)?

STATEMENT OF THE FACTS[1]

Montrym maintains that the Registrar's STATEMENT OF THE FACTS is inaccurate and deficient on several important points.

POINT 1: At p. 8 in his brief, the Registrar correctly states that the Report of Refusal to Submit to a Chemical Test (hereinafter "Report of Refusal") required by §24(1)(f) must be sworn to under the pains and penalties of perjury by the police officer receiving the refusal of a motorist to take the breathalyzer test, and "endorsed" by a witness to the refusal, and further "endorsed" by the appropriate police chief. However, further at p. 8, the Registrar states that both the

---

1 Montrym concurs with the Registrar's STATEMENT OF THE PRIOR PROCEEDINGS. However, it should be observed that the Registrar, and understandably so, did not include the contempt proceeding brought against him for failure to comply with the district court's judgment (A.59-60).

officer receiving the subject refusal and the witnessing officer must sign the Report of Refusal under the pains and penalties of perjury "as required by the challenged statute". From this point on, and notwithstanding the plain language of the statute, and the district court's findings,[2] the Registrar continues to state that both the receiving and witnessing police officers sign the Report of Refusal under the pains and penalties of perjury.[3]

POINT 2: The Registrar's description of the state court criminal proceedings against Montrym omits the important fact that the state court made specific findings of fact and entered these upon the face of the state court record. In particular, the state court found: "BREATHALYZER REFUSED WHEN REQUESTED WITHIN 1/2 HOUR OF BEING AT [THE POLICE] STATION. SEE ATTACHED AFFIDAVIT AND MEMORANDUM" (A.33). In

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2 See Montrym v. Panora, Registrar of Motor Vehicles, 429 F. Supp. 393, 398 (D. Mass. 1977).

3 See e.g., the Registrar's brief, at p. 26.

the affidavit (A.36-39) referred to, Montrym set forth under oath that he and his attorney, Richard B. Harris, Esq., had requested the police to administer the breathalyzer test and that the police had refused to do so. Montrym also set forth that the breathalyzer would have confirmed that he was not under the influence of intoxicating liquor.

POINT 3: The Registrar's version of events subsequent to May 25, 1976 is critically deficient, to say the least. An accurate statement is set forth as follows:

On May 25, 1976, the Registrar received the Report of Refusal from the Acton Police Department with respect to Mr. Montrym (A.29). On June 2, 1976, Montrym's attorney, Richard B. Harris, Esq., wrote the Registrar and informed him that the state court had dismissed the criminal charge of driving under the influence against Montrym (A.29, 42). Photocopies of Montrym's motion to suppress and accompanying affidavit (A.36, 39) were attached to this letter. Montrym's attorney also requested that any action relating to Montrym's license be stayed (A.42).

This letter was received by the Registrar on June 3, 1976 (A.29). On June 7, 1976, the Registrar suspended Montrym's license on the basis of the Report of Refusal and pursuant to §24(1)(f), (A.29). The suspension notice (A.44-45) set forth in part the following:

MONTRYM, DONALD E.

> You are hereby notified that in accordance with statutory authority I have this day SUSPENDED YOUR LICENSE TO OPERATE MOTOR VEHICLES.
>
> . . . .
>
> This action is effective as of the hour it was issued and you must comply with it immediately. You are subject to arrest if you fail to do so.
>
> . . . .
>
> When your LICENSE to operate motor vehicles has been suspended or revoked you must CEASE OPERATING and DELIVER

> TO ME AT ONCE said license and/or permit. You must not again operate a motor vehicle until your license has been reinstated.
>
> Robert A. Panora
> Registrar of Motor Vehicles

Montrym surrendered his license to the Registrar on June 8, 1976 (A.29). On June 11, 1976, the Registrar replied to Mr. Montrym's attorney as follows (A.48):

Dear Sir:

In reference to your letter of June 2, 1976 concerning the above-named, this is to advise you that his license has already been suspended and said license must be returned to this office immediately.

Very truly yours,

Robert A. Panora
Registrar

On June 28, 1976, Mr. Montrym, by the undersigned attorney, made a further demand (A.50, 51) for the return of his license, a portion of which reads as follows:

Dear Sir:

. . . .

Please be advised that Mr. Montrym did not refuse to submit to a breathalyzer test on May 15, 1976 and that he was acquitted of driving under the influence of intoxicating liquors, G.L. Ch. 90 §24(1)(a), on June 2, 1976, complaint no. 4703 in the District Court of Central Middlesex. In addition, the district court made a specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one. This finding is binding upon you. See Ashe v. Swenson, 397 U.S. 436 (1970).

Mr. Montrym depends on his driver's license for

his livelihood. Notwithstanding G.L. Ch. 90 §24(1)(g), your action in suspending his license without affording him a prior hearing is a patent deprivation of his liberty and property without due process and is in contravention of the Fourteenth Amendment of the United States Constitution. See Cicchetti v. Lucey, 377 F. Supp. 215 (1974); and Pollard v. Panora, ___ Supp. ___ (D. Mass. 1976).

Demand is hereby made upon you to immediately reinstate Mr. Montrym's driver's license.

. . . .

Very truly yours,

Robert W. Hagopian

Contemporaneous with these events, Montrym attempted to pursue his appeal

remedies[4] from the Registrar's action in suspending his license on June 7, 1976. More specifically, on this day, Montrym's attorney wrote the Board of Appeal on Motor Vehicle Liability Policies & Bonds for a hearing on the Registrar's action in suspending Montrym's license and denying Montrym's request for a stay as set forth in his attorney's letter of June 2, 1976 to the Registrar (A.29, 46). On June 8, the Board of Appeal mailed a set of forms back to Montrym's attorney (A.29, 47) who received them on June 10, 1976. Montrym's attorney mailed them back

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4 G.L. Ch. 90 §28 provides that "[a]ny person aggrieved by a ruling ... of the Registrar may, within ten days thereafter appeal from such ruling ... to the board of appeal on motor vehicle liability policies and bonds ... which board may, after a hearing, order such ruling ... to be affirmed, modified, or annulled; but no such appeal shall operate to stay any ruling ... of the registrar". The full text of this statute is set forth at p.10 n.6 in the Registrar's brief.

completed on the same day, and the Board of Appeal received them on June 11, 1976 (A.29). On June 24, 1976, the Board of Appeal notified Montrym that it would conduct a hearing on July 6, 1976 (A.49). Montrym did not pursue this hearing as he commenced the instant case on July 2, 1976 in the federal district court. A single judge of the district court issued a restraining order on July 9, 1976 enjoining the Registrar's action (A.23). On July 15, 1976, seven days later, the Registrar complied with the district court order and returned Montrym's driver's license (A.30).

POINT 4: Throughout his brief, the Registrar refers to a "same day" hearing that a motorist may receive pursuant to §24(1)(g). For purposes of clarification, Montrym calls to this Court's attention that when a motorist's license is suspended pursuant to §24(1)(f), he must cease operating his motor vehicle immediately, and surrender his license. He can get a hearing at any time thereafter on any day by walking into a Registry office and requesting one. If his license has been previously surrendered, he will be granted a hearing on the "same day" that he requests one. He cannot, however, continue to drive up to the point in time that he surrenders his license, surrender his license, and then demand a hearing.

SUMMARY OF ARGUMENT

The predicate for driver's license revocation under the subject Massachusetts procedure rests on three factors. First, there must be probable cause that the motorist was driving under the influence of intoxicating liquor. Second, a valid arrest must take place, and third, the motorist must have refused to take the breathalyzer test after being advised by the police that refusal would result in suspension of his license for ninety days.

Under the procedure, the police officer before whom a motorist allegedly refuses to take the test prepares a "form affidavit" to verify the existence of the three factors. The form affidavit is "endorsed" by a witness to the alleged refusal, and further "endorsed" by an appropriate police chief. Upon receipt of the affidavit, the Registrar sends the motorist a suspension notice advising him that his license was suspended as of the hour of its issuance, and that the motorist must surrender his license immediately. Although the suspension notice does not inform a motorist that he may obtain an "immediate" hearing on the underlying three factors, he can obtain such a hearing by walking into any Registry office and requesting one.

The question presented by this appeal is whether the Registrar's summary suspension procedure comports with the dictates of due process. Montrym argues that it does not. More specifically, he maintains that the Registrar's suspension notice is constitutionally deficient in that it does not advise the recipient of the availability of an "immediate" hearing. Far more important, however, is the intervening loss of one's license between the issuance date of the Registrar's revocation notice and the resolution of the "immediate" hearing proceeding, a seven day affair at a minimum. Such a deprivation is substantial and unconstitutional since the motorist is given no opportunity to respond prior to the taking.

While there are exceptions to the "root requirement" of a prior hearing, there are no countervailing governmental interests in the instant circumstances to warrant Massachusetts' doing away with all prior process. That removing drunk drivers from the road is a legitimate state concern is beyond doubt. However, this interest is irrelevant to the present issue since Massachusetts affords the driver who flunks the breathalyzer test a full judicial hearing prior to revoking his driver's license. Further, since the passage of Ch. 505 of the Acts of 1975, ninety

percent of all drunk drivers charged with driving under the influence of intoxicating liquor, including "the most menacing violator in the country, the repeat drunk driver", enter a Driver Education Alcohol Program and thereby avoid license revocation.

Leaving this aside, the risk of mistaken deprivation is significant. The determination of the three essential factors to license revocation necessarily involves a multitude of factual and legal issues, and not just one "simple objectively-ascertainable event" - whether a licensee refused to take the test or not. When such determinations are made on the basis of one-sided procedures, albeit by "form affidavits" of governmental officials, the risk of erroneous action is far from being constitutionally insubstantial.

That there are alternative and available Registry procedures which would afford a licensee prior process is beyond question since the Registrar is employing these in thousands of cases. In particular, and pursuant to G.L. Ch. 90 §22(b), the Registrar may, after due hearing, suspend a motorist's license if he believes he is an incompetent person to operate a motor vehicle. At least fourteen days prior to the hearing, the Registrar gives written notice to the licensee of his intention to suspend

his license as of a specified date. The notice specifies the reasons, and informs the licensee of his right to a hearing within fourteen days on the question of whether there is a just cause for such suspension. Why the Registrar could not adopt this procedure or, alternatively, give a motorist some prior opportunity to tell his side of the story, is not answered, and perhaps understandably so. One thing is certain, however, and that is if Montrym had been given this opportunity, an innocent man would not have suffered a serious deprivation.

Bottom line, Massachusetts' interest in the breathalyzer test is in obtaining evidence necessary to insure the successful operation of its rehabilatative program. This interest can be accomplished "just as well by observing some measure of due process as by not observing it". Accordingly, the judgment of the district court should be AFFIRMED.

ARGUMENT

Introduction

Montrym concurs with the Registrar in that the specific dictates of due process relating to a state's termina-

ting a motorist's driver's license are governed by the criteria set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

However, Montrym traverses the Registrar's application of these criteria to the case at hand for the reasons set forth following.

I - An Individual's Interest In His Driver's License Is So Substantial As To Invoke The Full Breadth Of The Due Process Clause.

The loss of one's driver's license may deprive a licensee of his liberty, livelihood, and pursuit of happiness, Wall v. King, Registrar of Motor Vehicles, 206 F. 2d 878, 882 (1st Cir. 1953)[5]; Allgeyer v. State of Louisiana, 165 U.S. 578, 589 (1897). It is "more serious for some individuals than a brief stay in jail", Argersinger v. Hamlim, 407 U.S. 25, (1972) Powell, J., concurring at p. 48. Such a deprivation is irreparable, irreversible, and is one

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5 "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a liberty which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process," Wall v. King, supra, 882.

for which there is no adequate remedy at law. As such, this Court held in Bell v. Burson, 402 U.S. 535, 539 (1971) that motor vehicle licenses were state-created interests which were protected by the due process clause:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that due process required by the Fourteenth Amendment. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated

> a "right" or a "privilege".[6]

In the instant case, sub. nom. Montrym v. Panora, Registrar of Motor Vehicles (hereinafter "Montrym I"), 429 F. Supp. 393 (three judge court, D. Mass. 1977), the district court held at p. 398 with respect to Montrym's interest in his driver's license:

> In the present action the plaintiff's interest is in possessing a valid driver's license and the attendant right to operate a motor vehicle on a public way in Massachusetts. Little

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6 Clearly, the loss of one's license for ten days is equally as substantial as the temporary loss of one's household furnishings, Fuentes v. Shevin, 407 U.S. 67 (1972), or a ten-day suspension from school, Goss v. Lopez, 419 U.S. 565 (1975); or the temporary loss of electricity in Memphis Light, Gas & Water Div. v. Craft, ___ U.S. ___ (May 1, 1978).

discussion is necessary to establish the importance of mobility in our society. According to the uncontroverted affidavit of the plaintiff, possession of a driver's license is essential to his livelihood. Moreover, an individual who has been erroneously deprived of his license can not be fully compensated for its loss by subsequent corrective administrative action. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970).[7]

Because of the important interest inherent in driver's licenses, this Court held in Bell v. Burson, supra, 542, that a state must afford a motorist "some kind of hearing" as a predicate to license revocation:

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7 To the same effect, see Judge Campbell's dissent in Montrym I, at 402: "There is, they say, no way to make someone whole for mistaken deprivation of a license. I suppose the latter has to be conceded."

> [W]e reject Georgia's argument that if it must afford the licensee an inquiry into the question of liability that determination ... need not be made prior to suspension of the licenses. While "many controversies have raged about ... The Due Process Clause," ibid., it is fundamental that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" before termination becomes effective. (original emphasis)

Similarly, every lower federal court that has considered the driver's license interest with respect to the issue raised in this case, has held it of such importance as to require "some kind of hearing" prior to state termination. See Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974), aff'd on other grounds, 513 F. 2d 1189 (6th Cir. 1975); Chavez v.

Campbell, 397 F. Supp. 1285 (three judge court, D. Ariz. 1973); and Holland v. Parker, 354 F. Supp. 196 (three judge court, D.S.D., C.D. 1973). See also Cicchetti v. Lucey, Registrar of Motor Vehicles, 377 F. Supp. 215 (D. Mass. 1974), rev'd on grounds of mootness, 514 F. 2d 362 (1st Cir. 1975); Pollard v. Panora, Registrar of Motor Vehicles, 411 F. Supp. 580 (three judge court, D. Mass. 1976), striking down a parallel procedure as unconstitutional; and Raper v. Lucey, Registrar of Motor Vehicles, 488 F. 2d 748 (1st Cir. 1973), making the due process clause applicable to motor vehicle license application procedures.

Notwithstanding the weight of authority set forth above, the Registrar maintains that an individual's private interest in his driver's license is not so substantial as to require an evidentiary hearing prior to suspension. In support of his position, the Registrar relies exclusively upon one sentence in Dixon v. Love, 431 U.S 105, 113 (1977): "We therefore conclude that the nature of the private interest here is not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' Mathews v.

Eldridge, 424 U.S. 319, 343". Montrym submits that the Registrar has taken this sentence out of context, and, as such, his reliance thereon is misplaced.

More particularly, the "private interest" in Dixon is not the complete loss of one's driver's license as the subject "Illinois statute include[d] special provisions for hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges", Dixon, supra, 113. The Illinois statute requires that a motorist whose license has been suspended or revoked file an affidavit setting forth facts to establish his eligibility for "relief and that the driver must return his license to the secretary and in its place is issued" a hardship permit, Dixon, supra, n. 7. Although it is not clear from this Court's opinion in Dixon as to whether applications for hardship permits may be considered before the post-evidentiary hearing under Ill. Ann. Stat. Ch. 951/2 §2-118, this counsel has been advised by the Technical Services Division of the Illinois Secretary of State that suspension notices issued pursuant to §6-206(a)(3) are not made effective until thirty days from the

date of their issuance,[8] and a licensee may immediately apply for a hardship permit.[9] In any event, it was because Illinois provided these hardship provisions, that this Court "conclude[d]" as it did in Dixon with respect to the nature of the "private interest". On the other hand, Massachusetts does not have any comparable provisions, and, as such, the district court concluded that "the potential for irreparable

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8 This time period would permit an aggrieved licensee to present "written objection ... to the Secretary's attention" in the case of "a clerical error", or, alternatively, time for the licensee to seek judicial injunctive relief, Memphis Light, Gas & Water Div. v. Craft, supra, .

9 As such, Montrym traverses the unsupported allegation on the part of the Registrar at p. 23 of his brief that hardship relief under the Illinois procedure is only available after suspension. Cf. Montrym v. Panora, Registrar of Motor Vehicles, 438 F. Supp. 1157, 1159 n. 1 (D. Mass. 1977).

personal and economic hardship [was] greater in Massachusetts than in Illinois", Montrym v. Panora, Registrar of Motor Vehicles (hereinafter "Montrym II"), 438 F. Supp. 1157, 1160 (three judge court, D. Mass. 1977).

Apart from these considerations, and as noted by this Court in Memphis Light, Gas & Water Div. v. Craft, U.S. ___, n. 24 (May 1, 1978), Dixon did not turn on the first factor of the Mathews test, but rather, it rested upon the second and third factors. As such, we turn to a consideration of these factors.

II - The Risk Of Erroneous License Deprivation Under The Massachusetts Procedure Is So Substantial That The Fourteenth Amendment Requires Some Opportunity To Respond Be Afforded A Licensee Prior To Suspension.

A. The "Temporary" Suspension Between Registry Action Under §24(1)(f) And Resolution Of The "Immediate" Hearing Under §24(1)(g) Is Clearly Subject To The Due Process Clause.

There can be no doubt that Massachusetts must afford a hearing at some time before it permanently deprives[10] a citizen of a liberty or property interest, Dent v. West Virginia, 129 U.S. 114 (1889). It is also equally

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10 "Deprivation" of a state-created interest also includes a state's refusal to grant the interest. Cf. Raper v. Lucey, Registrar of Motor Vehicles, 488 F. 2d 748, 752 (1st Cir. 1973).

clear that the right to notice, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950), and "opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394 (1914), "be granted at a meaningful time and in a meaningful manner", Armstrong v. Manzo, 380 U.S. 545, 552 (1965). However, the question presented by this appeal is whether due process requires that Massachusetts afford a citizen "some sort" of notice and "some sort" of opportunity to respond "before any 'taking'", Arnett v. Kentucky, 416 U.S. 134 (1974)(White, J., concurring and dissenting at p. 186.)

In addressing this issue, initially, it should be observed, as noted above, that in Bell v. Burson, supra, 542, this Court held that "except in emergency situations" a state must afford a motorist "'notice and opportunity for hearing appropriate to the nature of the case' before" terminating his driver's license. The importance of the hearing being given prior to termination is fundamental to due process:

> That the hearing required by the due process is subject to waiver, and is not fixed in form, does not affect its root requirement that an individual be given an opportunity for a hearing

> before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971). (original emphasis)

This principle has been applied with equal vigor to other governmental entitlements, and state-created property and liberty interests. See Memphis Light, Gas & Water Div. v. Craft, supra, striking down a "state" procedure failing "to provide notice reasonably calculated to apprise [consumers] of an administrative procedure to consider ... erroneous [electric] billings, and the failure to afford them an opportunity to present their complaints" before termination; Mathews v. Eldridge, 424 U.S. 319 (1976), sustaining the termination of disability payments under the Social Security Act where the state gave a recipient full access of all the information it was relying upon, a statement of reasons, a summary of the evidence it obtained by independent investigation, and an opportunity to respond by submitting his own

evidence and arguments "to challenge directly the accuracy ... and correctness of the agency's tentative conclusion", all prior to termination; Goss v. Lopez, 419 U.S. 565, 581-584 (1975), requiring school officials to provide opportunity for a student "to tell his side of the story" before imposing a short, ten day, school suspension; Arnett v. Kennedy, 416 U.S. 134 (1974), sustaining the removal of a civil service employee procedure under the Lloyd-LaFollette Act wherein the employing agency gave 30 days' advance written notice to an employee prior to removal, made available to him the material upon which the notice was predicated, provided the employee with an opportunity to appear before the governmental official making the removal decision to answer the charges against him, and rendering a decision, all prior to the effective date of removal; Morrissey v. Brewer, 408 U.S. 471, 485-487, (1972), requiring a preliminary evidentiary hearing before probation revocation; Fuentes v. Shevin, 407 U.S. 67, 96, (1972), striking down ex parte issuance of writs of replevin and imposing a prior hearing requirement; and Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969), striking down ex parte garnishment proceedings requiring prior notice and hearing before seizure. See also Goldberg v. Kelly, 397 U.S. 254 (1970).

Notwithstanding this plethora of authority, the Registrar argues that his "immediate" hearing procedure is constitutionally equivalent to the "root requirement" of a prior hearing. In particular, he argues that a licensee may "surrender his license" to the Registrar, and obtain an "immediate" hearing. Such an argument, however, ignores reality, let alone principles of due process. First, if a licensee receives a notice from the Registrar on a Friday or Saturday, chances are the earliest he could physically get to a Registry office would be Monday morning. He must cease operating his motor vehicle immediately (A.16). If he does not live in a large metropolitan area, more than likely, he will not be able to obtain public transportation.[11] Secondly, the notice (A.16) from the Registrar does not advise a licensee of the availability of obtaining an immediate hearing, a decisive factor in this Court's decision of Memphis Light, Gas & Water Div. v. Craft, supra: "Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure ... petitioners

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11 Cf. Raper v. Lucey, Registrar of Motor Vehicles, supra, 754.

deprived respondents of an interest in property without due process of law."[12] Third, assuming that a licensee could realistically arrange to get to a Registry office within a day or two after notice of suspension, and perhaps arrange to have his attorney there also, the chances are that the matter would not be resolved at the "same day" hearing. This is so because if the licensee raises factual issues, the hearing officer will suspend the hearing so that he will have an opportunity to bring the police officers in, or make a field investigation, or obtain counter affidavits (A.30). When viewed in toto, the procedure is roughly a seven to ten day affair.

A ten day "temporary" suspension is "nonetheless a 'deprivation' in terms of the Fourteenth Amendment". Fuentes v.

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12 The suspension notice does advise a motorist of his right of appeal from any decision or ruling pursuant to G.L. Ch. 90 §28. However, as Montrym's efforts bear witness, the minimum time for obtaining a hearing under this procedure would be about 30 days. By this time, one-third of the ninety day suspension would have expired.

Shevin, supra, 85. More specifically, the Fuentes Court held at p. 86:

> The Fourteenth Amendment draws no bright lines around the three-day, 10-day, or 50-day deprivation of property. Any significant taking of property is within the purview of the Due Process Clause. While the length and consequent severity may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a hearing of some kind.[13]

As such, any "temporary" suspension between the date of the Registrar's notice (A.16) and the resolution of the "immediate" hearing under §24(1)(g) is subject to the "root requirement" of prior process:

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13 See also Sniadach v. Family Finance Corp., supra, 342 (Harlan, J., concurring).

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. ... But no later hearing ... can undo the fact that the arbitrary taking that was subject to procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone," Stanley v. Illinois, 405 U.S. 645, 647. Fuentes v. Shevin, supra, 81-82.

There are, of course, exceptions to the "root requirement" of prior notice and opportunity before termination. Collectively, these exceptions are based on "extraordinary situations" calling for prompt government action or unusual "countervailing interests on the part of government" or in the case of private parties, a situation where the interest of one "party might be defeated outright",

Arnett v. Kennedy, supra, 188, (White, J., concurring and dissenting). Examples of such exceptions are found in Ewing v. Mytinger Casselberry, Inc., 339 U.S. 594 (1950), seizure of misbranded drugs; Fahey v. Mallonee, 332 U.S. 245 (1947), bank failure; Phillips v. Commissioner, 283 U.S. 589 (1931), governmental taxing power; Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928), emergency attachment of assets; Central Trust Co. v. Garvan, 254 U.S. 554 (1921), seizure under Trading with The Enemy Act; and North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). See also Fuentes v. Shevin, supra, 90-92, and Arnett v. Kennedy, supra, 186-190, (White, J., concurring and dissenting). In all these cases, this Court has not required a hearing before the initial "taking", Arnett, supra, 186. However, in each of the cases, a hearing was provided before the taking was finalized.

That there is no "situation" in the instant case[14] that would bring §24(1)(f) under the protection of the exception umbrella of the due process clause is made clear by the opinion of every federal judge that has passed on the

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14 The Registrar has emergency powers under G.L. Ch. 90 §22(a) and §29.

issue heretofore. More specifically, in Holland v. Parker, 354 F. Supp. 196, 202 (D.S.D., 1973), a three judge court held:

> The application of Bell v. Burson, supra, to the facts of the present case results in the conclusion that South Dakota's implied consent statute could survive constitutional challenge only if it met the requirements of an "emergency situation", justifying summary revocation of an operator's license upon refusal to submit to the blood test. At first glance it would appear that the South Dakota statute meets those emergency requirements as enunciated in Fuentes v. Shevin, supra. There is an important governmental and general public interest in keeping the drunk driver off the road, and therefore, if one can assume that a party who refuses the blood test is drunk and that the individual who is caught drunk once will likely be a repeater, there is certainly a legitimate interest in keeping that person from

future use of the highway. Secondly, it could be argued that there is a special need for "very prompt action"; and finally the person initiating the seizure is a "government official" (a law enforcement officer).

The fault in this argument lies in the fact that the state initiates its summary action not to remove the potentially drunk driver from the highways but only if the suspect refuses to submit to the test, which is in itself an irrelevant question. Thus under South Dakota law, if a suspect takes the test and is found to be presumptively under the influence of alcohol, ... his license is not summarily, automatically revoked and will not be revoked until he is convicted of the driving-while-intoxicated charge. ... South Dakota cannot argue that there is a need for summary action to remove the recalcitrant, potentially drunk driver since the basis for revocation without a prior hearing is not intoxication, but refusal to take the test. If there is time to permit prerevocation adjudication for the driver

found presumptively under the influence of alcohol, then there is no reason why the same opportunity should not be afforded the driver who refuses the test.

. . . . .

Thus, even under the emergency doctrine, South Dakota has failed to justify revocation without a hearing for a suspected driver who has refused the test when, if that same driver took the test, he would be permitted to retain his license and be provided a forum for his defense.

Likewise, in Chavez v. Campbell, 397 F. Supp. 1285, 1288 (1973), a unanimous three judge court held:

It cannot be denied that there is a compelling State interest to protect the public from drunk drivers. However, the effect of the implied consent law is not to remove drunks from the road, but rather to remove only those who have refused to submit to the test. Thus, a drunk who takes the breath test

continues to drive and keeps his license, while the driver who may be completely sober, and who refuses to take the test finds himself excluded from the highways.

Accord Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974), aff'd on other grounds, 513 F. 2d 1189 (6th Cir. 1975).

B. The Risk Of Erroneous Deprivation Under The Massachusetts Procedure Is Substantial.

Leaving aside the absence of any countervailing interest on Massachusetts' part to justify its summary suspension procedures under §24(1)(f), we consider next the procedure, and then the risk of erroneous deprivation under the procedure. The basis for license suspension under §24(1)(f) is set forth under §24(1)(g) and is as follows:

1. There must have been probable cause for a licensee's arrest.

2. There must have been a valid arrest.[15]

3. The licensee must have refused to take the breathalyzer test after having been informed by the police that his license would be suspended for a period of ninety days for refusing

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15 Although the term "arrest" in §24(1)(g) has never been construed by Massachusetts case law, we think it manifestly obvious that this term means valid arrest under applicable state and federal law. Indeed, a unanimous three judge federal district court held that the Fourteenth Amendment mandated this construction, Holland v. Parker, supra, 198-200.

to take the test.[16]

All three elements must be proved to justify suspension under §24(1)(f).[17]

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16 Although §24(1)(g) deals literally with whether or not such person refused to submit to such test, we think this provision must be read together with §24(1)(f), and as such, be construed to mean refusal after being advised that failure to take the test will result in license revocation for ninety days. The Registrar's Report of Refusal form (Appendix A) supports this construction. In any event, Bell v. Burson, supra, dictates such a result.

17 Notwithstanding the obvious, the Registrar in his brief at p. 27 maintains that the subject "statute makes simply the informed refusal of the test the ground for suspension". In support of this, he quotes two sentences from §24(1)(f). How the Registrar does away with §24(1)(g), and Bell v. Burson, supra, is something beyond legal imagination.

Under the procedure, the police officer who receives the alleged refusal to take the breathalyzer test prepares a Report of Refusal form prescribed by the Registrar. A copy of this "form" is set forth in Appendix A to this brief. The police officer must assert:

> 1. The grounds for the officer's belief that the licensee arrested had been driving a motor vehicle while under the influence of intoxicating liquors;
>
> 2. That the licensee was in fact arrested for driving under the influence of intoxicating liquors; and;
>
> 3. That the licensee refused to take the breathalyzer test "after having been informed that his license to operate would be suspended for a period

of ninety days for said refusal".[18]

Pursuant to §24(1)(f), the Report of Refusal must be signed under the pains and penalties of perjury by the officer witnessing the refusal,[19] and endorsed

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18 In the Report of Refusal form at A.40-41, the printed form is shown in standard type and the blanks filled in by the police officer are supposed to be in italics. Through an error in the preparation of the record appendix, the quoted language is shown in italics. A blank Report of Refusal form is set forth in Appendix A to this brief which shows the quoted language as part of the "form affidavit".

19 There is nothing in the statute which requires the officer receiving the refusal to be the arresting officer although this was true in Montrym's case.

by a third person witnessing the refusal, and further endorsed by an appropriate police chief.[20]

Viewing this procedure, Montrym asserts that the determination of whether probable cause exists to establish the commission of the criminal offense of driving under the influence of intoxicating liquors[21] cannot be made

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20 As noted above under "POINT 1" of the Statement of the Facts, the Registrar insists in his brief that both the receiving and witnessing police officers sign the Report of Refusal under the penalties of perjury. Not only is this contrary to the statute and the Report of Refusal form prescribed by the Registrar (Appendix A to this brief), but it is also contrary to the district court's finding in Montrym I, supra, at p. 398, that the Report must be "sworn to under the penalties of perjury by the officer to whom the refusal was made, endorsed by a third person who witnessed the refusal, and also endorsed by the police chief".

21 G.L. Ch. 90 §24(1)(a).

with substantial accuracy when based solely on the form affidavit prescribed by the Registrar.[22] By comparison, under Massachusetts procedure, probable cause determinations relating to criminal offenses are made for the most part by judicial inquiry at full adversary hearings in its first-tier courts.[23] Indeed, even in applications

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22 This is particularly true in driving under the influence cases, as usually the police arrive at the scene of an accident and have not made any observations of the conduct of the subject licensee's automobile. Also, in considering the probability of error being committed, it should be observed that the Registrar and his delegates are not attorneys or trained judicial officers, Cf. North v. Russell, 427 U.S. 328 (1975).

23 Under Ch. 478 of the Acts of 1978, effective January 1, 1979, a criminal complaint cannot be issued unless there is an arrest or extentuating circumstances without affording an accused some form of a prior hearing.

for search warrants, probable cause must be determined by inquiry before a neutral magistrate, Coolidge v. New Hampshire, 403 U.S. 443 (1971). Cf. Fuentes v. Shevin, supra, n. 30. Similarly, Montrym maintains that determinations of the validity of a police arrest,[24] or whether the police properly gave a licensee his rights under §24(1)(f), often involve varying factual patterns which cannot be resolved with any appropriate degree of accuracy on the sole basis of one-sided form affidavits. Manifestly, such form affidavits give rise to the "specter of questionable credibility and veracity", Richardson v. Perales, 402 U.S. 389, 407 (1971). As such, they are in pari delicto with the one-sided affidavits struck down in Fuentes v. Shevin, supra.

The case at hand illustrates the difficulties in determining the three issues under §24(1)(g). Initially it should be observed that the Report of Refusal form submitted to the Registrar (A.40, 41) sets forth no facts concerning Montrym's "driving behavior". Indeed, the sole factual basis to support a probable cause determination

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24 G.L. Ch. 90 §21 sets forth the law of arrest with respect to motor vehicle violations. See also G.L. Ch. 90 §29.

that Montrym had committed the criminal offense of driving under the influence of intoxicating liquor was a one sentence description of the "symptoms of intoxication":

> A strong odor of an alcoholic beverage emitted from his person, he was glassy-eyed and unsteady on his feet and he had to hold onto the st. marker to maintain his balance, also spoke in a slurred fashion.

Montrym submits that this language is nothing more than police boilerplate and totally inadequate to establish in itself probable cause that he had been driving under the influence of intoxicating liquor.

More specifically, the Report of Refusal does not set forth any facts to establish operation other than the police officer's filling in Montrym's name in an appropriate blank. Operation is an essential element, and one of the major defenses to the offense. See generally Defense of Druken Driving Cases, Erwin, (Mathew Bender) 3rd ed. Secondly, the Report of Refusal does not set forth one fact relating to Montrym's "driving behavior". Indeed,

it does not even set forth that Montrym was involved in an accident, or if there was one, how it came about. It contains no statements from Montrym, the operator of the other vehicle, or any witness to the accident. Further, the Report of Refusal does not set forth any specific facts to substantiate Montrym's alleged refusal to take the breathalyzer test. It merely sets forth the prearranged printed script:[25]

> The said operator was offered a chemical test or analysis of his breath, but that said operator refused to submit to said test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the Commonwealth would be suspended for a period of ninety days for said refusal, in the presence of the undersigned and a third person witnessing such refusal.

As such, the Report of Refusal is nothing more than meaningless police litany.

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25 See Appendix A to this brief and n.18 supra.

In the state court criminal proceedings, Montrym filed a motion to suppress (A.36, 37) in which he asserted that there was no probable cause to justify his arrest,[26] or probable cause to establish that he was driving under the influence. Further, Montrym alleged that he was denied "the opportunity to exculpate himself by means of the breathalyzer test" (A.37). In support of his motion, Montrym filed an accompanying affidavit (A.38, 39) under the pains and penalties of perjury, setting forth the events that took place on the evening in question. More specifically, Montrym related that the automobile in which he was traveling was hit behind the right rear wheel by a motorcycle. The police arrived and arrested him.[27] At the police station, he was asked whether he wanted "to submit to a breathalyzer test and refused, not knowing that refusal would cost him his license". Twenty minutes after this refusal, by coincidence, Montrym's attorney, Richard Bates Harris, Esq., arrived at the police station. Thereupon, both Montrym and his attorney

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26 See n.24, supra.

27 This is the first time in his life Montrym had "ever been arrested, searched or apprehended by any police" (A.38)

requested the police to administer the breathalyzer test. The police refused. Further, Montrym sets forth his belief that the breathalyzer test would have confirmed that he was not intoxicated or under the influence of intoxicating liquor that evening (A.38-39).

After a hearing before the District Court of Central Middlesex, the complaint charging Montrym with driving under the influence of intoxicating liquor was dismissed. Additionally, the Court entered its specific findings of fact upon the face of the record (A.33):

> 5-28-76 Motion to Suppress & Affidavit filed.
>
> Dismissed. Breathalyzer refused when requested within 1/2 hr. of arrest at station. See affidavit & memorandum.

Leaving his case aside, Montrym maintains that the probability of error is substantial since the Registrar's action is based solely on a "form affidavit", which is inadequate, per se, to establish the three factors under §24(1)(g) necessary to justify suspension under §24(1)(f). Additionally, the risk of error derives from the one-sided procedure. As Justice Frankfurter so eloquently expressed in his concurring

opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-171 (1951), "fairness can rarely be obtained by ... one-sided determination of facts decisive of rights. ... and self-righteousness gives too slender an assurance of rightness". Although the risk in the unilateral procedure is reduced by the affidavit and perhaps the police chief's endorsement, it still remains a one-sided procedure and as such, is not an adequate substitute to having a motorist "present his side of the story," Goss v. Lopez, 419 U.S. 565, 581 (1975).

The Registrar, however, argues that the risk of erroneous action is "trivial" and constitutionally insubstantial. In support of his position, the Registrar argues, first, that the refusal to take the breathalyzer is a "simple objectively-ascertainable event",[28] quoting from Montrym II at 1161. Similarly, Judge Campbell in his dissent in Montrym II at 1163 set forth the same: "The only question is the existence or non-existence of a readily observable fact." The short answer to this argument is that suspension under §24(1)(f) is not predicated solely upon refusal or non-refusal to take the breathalyzer, but on all three factors set forth in §24(1)(g). As noted above, the determination of these three factors involve

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28 Appellee's Brief at p. 26.

many facts, most of which are subjective in nature. Clearly, such a determination involves more than whether a "buyer-debtor has either defaulted or he has not", a determination which this Court has held involves a substantial risk of error when based on one-sided procedures, Fuentes v. Shevin, supra, 83, 93. See also Pollard v. Panora, Registrar of Motor Vehicles, 411 F. Supp. 580 (three judge court, D. Mass. 1976), where the determination was whether a motorist either defaulted or did not default a court summons.

Secondly, the Registrar maintains that the risk is minimal since the affidavit is executed by a governmental official. In particular, the Registrar adopts the reasoning of Judge Campbell's dissent in Montrym II at 401:

> These facts must be reported by the officer in whose presence the test was refused, under penalties of perjury, with an endorsement by a third party who witnessed the refusal as well as by the Chief of Police. That such a report will be reliable in the vast majority of cases seems to me to be a reasonable assumption. The officer assumes personal responsibility for the report; he can be held personally

liable, and may be in trouble with his Chief, for any wilful misrepresentation.

With due deference to the learned judge, Montrym submits that the possibility of error does not turn on probability of police perjury, but rather it derives from the one-sideness of the procedure. Although the affidavit is furnished by a governmental official instead of a private party, Cf. Fuentes v. Shevin, supra, 91, the fact remains that the police officer has an interest in the outcome of the controversy.[29] His version of the facts is tailored to serve his interests and is predicated on his view. As such, the risk of error is clearly not insubstantial.

Montrym's case illustrates only too well the problem in relying upon affidavits of government officials. The police officer signed the affidavit under the pains and penalties of perjury that Montrym refused to take the breathalyzer. This, of course, was true as this fact is confirmed by Montrym in the criminal proceedings (A.39). On the other hand, the police officer failed to advise the Registrar of the critical fact that Montrym requested the breathalyzer twenty minutes later, and that he

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29 Indeed, the police officer is in a sense a litigant in the companion criminal proceedings.

refused to give the breathalyzer to Montrym. It well may be that the police officer's failure was based on his good faith view of the law that Montrym's subsequent change of mind did not erase his initial refusal. As it turned out, however, the police officer's view was in error.[30]

Lastly, the Registrar maintains that Montrym's case was an unusual one and that this Court should not make it the basis for invalidating §24(1)(f). Montrym maintains that the circumstances relating to his refusal are not unusual. First, there can be no doubt of the emotional upset he underwent on the evening in question. This was the first time he had ever been arrested, searched, or apprehended by any police (A.38). He was also "frisked and manacled with hands behind his back", (A.38). Due to the arrest, Montrym became separated

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30 Some states have obviated this problem by defining the time in which the test must be given. See e.g., N.C.G.L. Ch. 20 §20-16.2(1)(4) which sets forth that a motorist has "a right to call an attorney and select a witness...; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights".

from his son of whom he was a sole surviving parent (A.39). He alleges that the police never advised him of the consequences of his refusal to take the breathalyzer as they were required to under §24(1)(f). Further, Montrym was unable to reach an attorney by telephone (A.39). Montrym submits that it is not unusual for a citizen to refuse to take a police-administered test when he does not know the consequences of his refusal and where he has not been able to consult with an attorney concerning the consequences. The fact that Montrym changed his mind upon consulting with an attorney within twenty minutes (A.39) is supportive of his position. In any event, the number of times the police fail to give an arrestee his rights is not anymore unusual than the number of times the computer slips up, a possibility this Court held as not being "insubstantial" in Memphis Light, Gas & Water Div. v. Craft, supra.[31]

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31 Montrym also alleged that the police had no probable cause to arrest him. The fact that he was found not guilty on the driving to endanger charge supports his position.

C. The Registrar Has Alternative Procedures Open To Him Which Would Provide A "Meaningful Hedge Against Erroneous Action".

Montrym condedes that the Fourteenth Amendment does not guarantee him a full evidentiary hearing with an unconditional right of cross examination prior to license termination pursuant to §24(1)(f). His position is that he should have a minimum opportunity to respond, or "to tell his side of the story" prior to any action being taken by the Registrar. Montrym further argues that such opportunity must be given at a meaningful time.

To be sure, an aggrieved licensee can file a written objection[32] prior to the Registrar's action. That such a procedure would be nothing more than an exercise in futility is evidenced by the Registrar's response to Montrym's attorney's efforts. It is submitted that the Registrar's response (A.48) to Montrym's attorney's "written objection" (A.42) is a paradigm of Registry bureaucracy. The Constitution must hold state

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32 Cf. Dixon v. Love, supra, 113; "Of course there is the possibility of clerical error, but written objection will bring a matter of that kind to the Secretary's attention".

officials to a higher level than that of zombies. Cf. Wood v. Strickland, 420 U.S. 308, 322 (1975).[33]

Alternative Registry procedures were suggested by a unamimous three judge court in Pollard v. Panora, Registrar of Motor Vehicles, supra, at 588. Montrym submits that these procedures are appropriate to the circumstances of this case:

> [T]he present notice of suspension [A.16] might be amended to provide notification of a time and place where the [licensee] will have an opportunity to show cause as to why his license should not be suspended on a given date for his failure to have appeared at a prior hearing. This would not even require an increase in postage. Of course, it is not the responsibility of this court to suggest any one of among several methods by

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33 See also the "written objections" in Pollard v. Panora, Registrar of Motor Vehicles, supra, 582-583. Cf. Raper v. Lucey, Registrar of Motor Vehicles, supra.

> which the state may satisfy due process. As the Court of Appeals has said however, ... 'if the state can accomplish its purpose just as well by observing some measure of due process as by not observing it, it should tread the former path.' Palmigiano v. Baxter, 487 F. 2d 1280, 1287 (1st Cir. 1973)... .

See also the majority's approach below in Montrym I at 398-399, and Montrym II at 1160: "The opportunity need not be a formal hearing, but must at a minimum give the licensee a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust." This approach is substantially the same suggested by this Court in Goss v. Lopez, supra, 583-584;

> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then

determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses.

In oral argument below, Judge Campbell suggested essentially the same procedure. See Montrym II, 1159-1160, at n. 2. Further, Judge Campbell asked the Registrar why he could not adopt such a procedure. The Registrar did not answer the question then, nor has he answered it in his brief. The reason he does not answer is simple - he is embarrassed to advise this Court that he is currently using this procedure in thousands of other cases pursuant to Ch. 90 §22(b) which provides that:

1. The Registrar, after due hearing, may revoke the license of any person who he believes is an incompetent person to operate a motor vehicle.

2. At least fourteen days prior to such hearing, the Registrar must give a written notice to the licensee of his intention to suspend his license as of a specified date.

3. The notice must specify the reasons for the intended suspension and inform the licensee of his right to a hearing within fourteen days on the question of whether there is just cause for such suspension.

D. The Registrar's Reliance On Dixon V. Love, 431 U.S. 105 (1977) Is Misplaced.

Lastly, on this branch of the argument, Montrym traverses the Registrar's reliance upon Dixon v. Love, 431 U.S. 105 (1977) as supporting his position that the summary procedure under §24(1)(f) is constitutionally valid. In Dixon, this Court held that a pre-termination hearing was not required before Illinois could revoke a motorist's driver's license. More particularly, under the Illinois procedure, the Secretary of State was required to revoke a motorists' license if it "had been suspended three times in 10 years". Love's license had already been suspended twice and a third suspension was "required under a different rule because [he] had three convictions in one year". All three suspensions were based upon traffic convictions, the validity of which Love did not contest. As such,

this Court concluded that "an evidentary hearing need not precede revocation of a driver's license ... for [Love] 'had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the ... decision was based'", Memphis Light, Gas & Water Div. v. Craft, supra, n. 24, quoting from Dixon, and holding that Dixon was an "exception to the requirement of some prior process".[34]

The factors in the present case are not even remotely similar to those in Dixon. Montrym's revocation was not based on any adverse judicial or administrative findings, and neither was he given any opportunity to respond or to tell his side of the story prior to

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34 See also Almeida v. Lucey, Registrar of Motor Vehicles, 372 F. Supp. 109 (three judge court D. Mass.), aff'd, 419 U.S. 806 (1974); Scott v. Hill, 407 F. Supp. 301, 304 (E.D. Va. 1976); Nusberger v. Wisconsin Division of Motor Vehicles, 352 F. Supp. 515 (W.D. Wisc. 1973); and Wright v. Malloy, 373 F. Supp. 1011, 1018-1019 (three judge court D. Vt.), aff'd 419 U.S. 987 (1974).

the Registrar's action in suspending this license. As such, the risk of error between the Illinois and Massachusetts procedure is not comparable. Accordingly, Montrym maintains that Dixon is inapposite to the issues at hand.

III - There Is No Governmental Interest At Hand To Justify Massachusetts' Denying A Motorist His Fundamental Right To A Meaningful Opportunity To Respond Before It Seizes His Property.

With reference to the third branch of the Mathews test, the Registrar calls to our attention Massachusetts' interest in removing drunks from the highway. In particular, the Registrar quotes from Dixon, supra, the need "to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the safety of others". Further, the Registrar sets forth the statistics on fatal injuries and the percentage of alcohol-related fatal accidents. These show that alcohol is involved in approximately one-third of all the fatal accidents (A.31, 70-74). As such, the Registrar maintains that the Massachusetts has a compelling interest in lessening the carnage on its highway

which in turn justifies its summary suspension procedures under §24(1)(f).

This argument on the part of the Registrar is specious, to say the least. More specifically, the Massachusetts legislature has provided, pursuant to §24D, that any driver who is charged or convicted with driving under the influence of intoxicating liquor can be assigned, if he consents, to the Driver Educational Alcohol Program (hereinafter, "THE PROGRAM"). Further, §24E provides that if such person has the criminal complaint "continued without a finding", then, upon compliance in THE PROGRAM, the driving under the influence charge is dismissed. When a case is "continued without a finding", no conviction appears upon the face of the record, and, as such, the Registrar does not revoke the person's license pursuant to §24(1)(b).[35]

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35 Cf. Costarelli v. Massachusetts, 421 U.S. 193 (1975); Costarelli v. Panora, Registrar of Motor Vehicles, 423 F. Supp. 1309, aff'd 431 U.S. 934 (1977); and Costarelli v. The Commonwealth, 734 Mass. Adv. Sheets [1978].

In 1976, the first year THE PROGRAM was in effect, 85%[36] of all drunk drivers charged with driving under the influence of intoxicating liquor received a "continued without a finding" disposition and, as such, continued to operate their motor vehicles of the highways of Massachusetts and the rest of the nation. Although the statistics have not been published for 1977, they indicate the percentage to be approximately 90%. Since Massachusetts has permitted almost all of its drunks to

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36 The number of persons receiving a "continuance without a finding" disposition for 1976 was 14,986, according to the 1976 Annual Report of the Office of the Commissioner of Probation on THE PROGRAM. The statistics for the number of driving under the influence cases are published by fiscal years ending June 30, and in fiscal year ending June 30, 1976, there were 17,735 cases. See n.41 to appellant's brief. Of the 17,735 defendants charged, some, obviously, were found not guilty. Of these, some were truly innocent and as such, should have been excluded from the percentage calculation.

remain on the road, the question arises as to what compelling state interest exists to justify Massachusetts summary procedure under §24(1)(f). The short answer is there is none.

Besides neglecting to inform this Court of the crucial statistics set forth above, the Registrar has further misled this Court by maintaining that THE PROGRAM is only available to "first-time" and "new offender[s]". See the Registrar's brief at pp. 12 & 32. His position is correct with reference to THE PROGRAM when it commenced on July 1, 1975 pursuant to Ch. 647 of the Acts of 1974 (§24D). However, on July 15, 1975, the Governor signed Ch. 505 of the Acts of 1975 (§§24D & 24E) with an emergency rider making it effective immediately.[37] The effect of Ch. 505 was to open the floodgates to repeat offenders by allowing them to enter (and reenter) THE PROGRAM and eliminate their licenses from being revoked.

An examination of the legislative history of Ch. 505 shows that the Registrar "strongly" opposed the bill. Indeed, the Registrar wrote the governor of July 11, 1975 urging him not to sign the bill. He also set forth his reasons

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37 Sections 24D and 24E are set out at pp. 42 and 47 of appellant's brief, respectively.

in a memorandum which, to put it mildly, flies in the face of his present position that the Massachusetts' rehabilitative provisions are only applicable to "first-time offenders":

> ... Chapter 647 proved to be a severe departure from the basic liquor law as expressed under Chapter 90, Section 24 [(1)(a)], but it was never given a chance to be implemented.
>
> On the heels of the effective date of Chapter 647, H.6412 appears and effectively blows 647 to pieces, for within its message the most menacing violator in the country, the repeat drunk driver, is treated as if a first offender.
>
> Fifteen members of the Chapter 130 Commission took all facets of the drunk driver situation into consideration and unanimously concluded that a repeat offender should <u>not be given consideration</u>!!! Yet H.6412 ignores this and chooses to treat him as if he never were convicted previously.

Chapter 647 gave the courts an alternative procedure in handling convicted drivers provided they had not been previously convicted within a six year period, and those of us who worked with this statute were looking forward to implementing the July 1, 1975 statute, because we believe seriously that the first offender did indeed deserve the consideration being given him. However this new bill (H.6412) waters down the intent of the Committee and the proponents of the legislation to the point that we are now simply shuffling papers. (emphasis added)[38]

---

38 Statistics bear out the Registrar's fears concerning "the most menacing violator in the country, the repeat drunk driver". The 1976 Annual Report of the Office of the Commissioner of Probation on THE PROGRAM shows that 5-10% of all its "graduates" were back in THE PROGRAM while all the time they remained on the road.

Bottom line, the Massachusetts legislature has made a policy determination that drunk drivers, including "the most menacing driver in the country", should be rehabilitated in THE PROGRAM rather than penalized by license revocation. Since there is a rational basis[39] for such a determination, and since it was made through

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39 See House Bill 6163 which includes The Report of the Special Commission Relative to the Penalty for Driving under the Influence of Intoxicating Liquor at p. 6: "The current mandatory one year revocation period has proven less than totally effective in controlling drunk driving in Massachusetts. In the face of such an inflexible sanction, and given a sensitivity to the economic hardship which results from the loss of the driving privilege, police officers appear reluctant to arrest drunk drivers. Judges similarly appear reluctant to enter convictions in drunk driving cases. And, on appeal, juries appear reluctant to sustain convictions".

the "majoritarian political process", it is entitled to the highest degree of deference by this Court. Cf. Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

Montrym submits that Massachusetts' sole interest in the breathalyzer test is in obtaining evidence necessary to insure the successful operation of its rehabilitation program. That this interest can be accomplished without the threat of instant punishment and "just as well by observing some measure of due process as by not observing it", Palmigiano v. Baxter, supra, 1287, is obvious. As such, there is no justification on Massachusetts' part to warrant its summary procedures.

Lastly, the Registrar asks this Court to consider the administrative burden that would result if this Court were to impose a prior hearing requirement to revocation under §24(1)(f). In support thereof, the Registrar cites the fact that the Massachusetts courts processed 17,735 driving under cases in fiscal year ending June 30, 1976, and maintains that additional Registry hearing officers will be required to conduct the hearings.

Montrym traverses this argument. First, he submits that administrative efficiency, per se, should not be a

consideration in resolving whether due process requires an opportunity to respond, but should be considered only with reference to what type of opportunity to respond the State must afford a licensee. In the instant case, Massachusetts provides no opportunity to respond, and to this extent, administrative efficiency is not an issue.

Secondly, Montrym maintains that the administrative burden required of a state to meet the minimum dictates of due process cannot serve as a basis for its denying a citizen his constitutional rights:

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. ... Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interest of the person whose possessions are about to be taken. Fuentes v. Shevin, supra, at n. 22.

Apart from these considerations, there is no valid reason why the Registrar cannot conduct his entire ten-day "immediate" hearing procedure, which he is presently using, prior to revocation under §24(1)(f) instead of after revocation. As such, he would not even bear "an increase in postage", Pollard v. Panora, Registrar of Motor Vehicles, supra, 588. The Registrar, however, argues that if a prior opportunity to respond is afforded a licensee, the number of hearings will be greater and this in turn will cause an increased administrative burden.

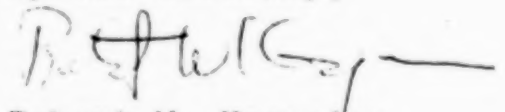
The Registrar does not set forth any specifics with respect to any potential increase in the number of contested cases, or any attendant incremental costs. Rather, he has chosen to muddy the waters by citing the annual number of driving under the influence cases in Massachusetts' first-tier courts. What this number has to do with the issue at hand is a legal mystery. In terms of present reality, the number of licensees refusing the breathalyzer test has been steadily declining since the threat of license revocation resulting from the criminal charge of driving under the influence has almost vanished in light of the passage of Ch. 505 of the Acts of 1975. In short, any increased administrative cost that might flow from this Court's imposing a prior opportunity to respond requirement would be

constitutionally insignificant when weighed against a licensee's claim of innocence.

CONCLUSION

For the reasons set forth above, Montrym respectfully prays this Court to AFFIRM the judgment below.

By his attorney,



Robert W. Hagopian
Orion Research Inc.
380 Putnam Ave.
Cambridge, MA 02139
(617) 864-5400

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
REPORT OF REFUSAL TO SUBMIT TO CHEMICAL TEST

TO: The Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

FROM: _____
(Name of Police Unit)
_____
(Address)

RE: _____
(Operator's Name)
_____
(Address)
_____
(City) (State)
_____
(Date of Birth) (Exp.Date of Lic.)
_____
(License Number-Indicate Issuing State)

_____
(Vehicle Owner)
_____
(Address)
_____
(City) (State)
_____
(Reg. No.) (State)
_____
(Exp. Date of Registration)

Was the operator arrested on a charge of operating a motor vehicle while under the influence of intoxicating liquor upon a way or in a place to which the public has a right of access as invitees or licensees in violation of Section 24 of Chapter 90 of the General Laws?

YES _____ NO _____

Date of Arrest _____ Location _____

Name of Arresting Police Officer _____

State reasonable grounds as follows to believe that the said operator committed said violation:

(1) State operator's driving behavior and details of pursuit (if any) and apprehension:

_____
_____
_____

(2) State symptons of intoxication: _____
_____
_____
_____

The said operator was offered a chemical test or analysis of his breath, but that said operator refused to submit to said test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the Commonwealth would be suspended for a period of ninety days for said refusal, in the presence of the undersigned and a third person witnessing such refusal.

_____
At (Place, Date and Time of Refusal)

Commonwealth of Massachusetts

_____, ss.
(County)

Signed under the penalties of perjury this _____

day of _____, 19_____.

_____
Signature and title of police officer
(before whom such refusal was made)

_____
Police Chief or authorized person

_____
Signature of third person witnessing refusal

MP-BUS 3t (rev.2)

FOR ARGUMENT

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Reply Brief of the Appellant.

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
Assistant Attorney General,
MITCHELL J. SIKORA, JR.,
Assistant Attorney General,
STEVEN A. RUSCONI,
Assistant Attorney General,
Department of the Attorney General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1032
Attorneys for the Appellant.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
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APPELLANT,

v.

DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Reply Brief of the Appellant.

Introduction.

In the course of his brief, the Appellee Montrym presses several points of fact and argument which the Appellant Registrar believes to be inaccurate. Pursuant to Supreme Court Rule 41(3), the Registrar submits this short reply brief to address those points. The reply is organized around the three constitutional criteria governing the need for a prior hearing in the circumstances of this case: (1) the substance of the private

interest in a driver's license and the magnitude of its deprivation under the Massachusetts implied consent law; (2) the risk of an erroneous deprivation under the Massachusetts process; and (3) the countervailing public interest in the treatment of intoxicated driving by the state system in question.

More generally, one mode of the Appellee's argument seems misdirected: its reliance upon peculiar "as applied" facts for a general attack upon the face of a public safety statute. At several points of his brief, Montrym introduces factual colorations which the parties have never agreed upon in the preparation of a record for decision of the general constitutional question presented originally in the district court and now here. The Registrar accepts as true only those facts appearing in the parties' Agreed Statement of Facts and Documents (A. 28-31). He does not accept Montrym's affidavit representations about the circumstances of his accident and arrest (A. 38-39; Brief, 54-55); or his contention about the need for a contempt proceeding to enforce the judgment below (A. 59-60; Brief, 4 n.1). These tactical items, never tested by an evidentiary proceeding, appear in the Appendix at Montrym's insistence and do not relate to his class action attack upon the facial validity of the Massachusetts implied consent law.

Argument.

I. Montrym's Description Of The Magnitude Of The Deprivation Of A Driver's License Under The Massachusetts Procedure Is Not Accurate.

Montrym makes two questionable assertions about the degree of injury suffered by a driver facing license suspension in Massachusetts.

First, he suggests that a typical driver will incur an actual suspension of seven to ten days because of delays inherent in the administration of the "same-day" hearing opportunity afforded by the Registrar at the time of license surrender (Appellee's Brief, 31-32). Nothing in the record supports such speculation. The Registrar submits that the usual driver can obtain a hearing opportunity at any one of the 35 Registry offices distributed across the state within one to two days of suspension notice. Simple mistakes will be immediately curable. Closer claims can proceed as expeditiously as the hearing officer receives testimony from the driver and the witnessing police officers.

At the same time, Montrym acknowledges that the seven-to-ten day figure is the usual limit of injury. This time span, if assumed, would not inflict grievous harm, and amounts to a significant concession in the measure of the affected private interest balancing against the law's highway safety objectives.[1]

Second, Montrym relates, from communication with the office of the Illinois Secretary of State, that the license suspension of the kind challenged in *Dixon* v. *Love*, 431 U.S. 105 (1977), is not effective for 30 days (during which a licensee might apply for a hardship permit) (Appellee's Brief, 24-26). Thus, he concludes, the license deprivation in Illinois is far less harmful than that in Massachusetts. This fact, if true, appears nowhere in the decision of *Dixon* v. *Love*. The Court appears to have assumed that suspension was immediate. See 431 U.S. at 109-110 & nn.5-7. The quoted Illinois Rules support that reading. *Id.*, nn.5-7. Thus the notion of a 30-day interim played no material part in the Court's discussion and decision of that case, and no part in the argument and decision

[1] One of the mysteries of Montrym's case remains his failure to exercise his same-day hearing opportunity and to present his state court disposition to a Registry hearings officer (A. 28-29).

of this case in the district court. Consequently, the point is irrelevant and the precedential force of *Dixon* unaffected.

II. Montrym's Prediction Of The Likelihood Of Error Under The Massachusetts Procedure Is Exaggerated.

Montrym asserts a high likelihood of error under the Massachusetts procedure because of its use of "one-sided form affidavits" (Brief, 39-51) and because of police bias (Brief, 52-53). These contentions are seriously exaggerated.

The affidavit in use is not a mechanical checklist, but requires independent narrative description from the reporting officer. See A. 40-41. In this instance, for example, the officer in the required statement of reasonable grounds for his belief that Montrym had been driving under the influence of intoxicating liquor specified four discrete symptoms of intoxication: the odor of alcohol; glassy eyes; slurred speech; and unsteady footing requiring the driver to hold onto a street marker in order to maintain balance. *Id.*

As to a general theory of police bias, the Registrar finds it difficult to respond to a broad imputation of bad faith or self-righteousness on the part of police officers. Elsewhere Montrym cites Massachusetts legislative history suggesting police reluctance to arrest intoxicated drunk drivers out of concern for the license sanctions (Brief, 68 n.39). Neither generalization is reliable. Instead, the constitutionality of the Massachusetts scheme should turn on the quality of its processes, especially the duty of the arresting officer to describe his observations, and the duty of that officer to support those statements at a same-day hearing before a Registry official.

III. Montrym's Assertion That The Massachusetts System Presently Allows "Repeat Offenders" To Remain On The Road And That It Thereby Disserves The Public Interest Is Unfounded.

Montrym argues vehemently that the Massachusetts law serves no governmental interest because it subjects him to alcohol education and rehabilitation programs instead of immediate removal from the highway and especially because it authorizes a state court to commit a repeated offender to a program in lieu of license revocation. Montrym's climactic assertion appears at page 65 of his brief:

> The effect of Ch. 505 (a 1975 statutory amendment) was to open the floodgates to repeat offenders by allowing them to enter (and reenter) THE PROGRAM and eliminate their licenses from being revoked.

The floodgate metaphor is particularly careless. A full reading of the governing Massachusetts statutes (Mass. Gen. Laws c. 90, §§ 24D, 24E, as reproduced in Appendices E and F of the Appellant's original brief) shows that placement of a driver in a program always remains in the discretion of a state judge; that a prerequisite for placement is an investigation and report of the driver's history to the judge by the court's probation department; that the report must include all Registry records of the driver and, most importantly, any recommendation by the Registrar concerning the driver's eligibility for early reinstatement of his license; and, finally, that the judge must report the disposition of every case to the Registrar. See Appellant's Brief, 42-43, 47. In this system of judicial discretion, informed by Registry data and recommendation and by probationary supervision of a driver in the program, the recid-

ivist drunken driver is unlikely to meet with an open floodgate.[2]

The institutional role of the Registrar (documented by Montrym, Brief, 65-66) is typically to recommend against program placement of a repeater. A judge encountering a driver who has used up one program disposition can be expected to exercise discretion soundly against another. Indeed, Montrym's sole substantiation of the floodgate phenomenon is a reported estimate that 5 per cent to 10 per cent of program graduates have returned to it (Brief, 67 n.38). The Registrar reads this statistic to mean that in the overwhelming majority of repeated offenses the courts are adopting his recommendation against further program placement and in favor of license revocation. The rehabilitative objectives of the program are not leaving the habitual intoxicant on the highway to endanger the public.[3]

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[2]In this light Montrym's assessment of legislative purpose seems equally wide of the mark (Brief, 68-69):

> Bottom line, the Massachusetts legislature has made a policy determination that drunk drivers, including "the most menacing driver in the country", should be rehabilitated in THE PROGRAM *rather than penalized by license revocation*. Since there is a rational basis for such a determination, and since it was made through the "majoritarian political process", it is entitled to the highest degree of deference by this Court [emphasis original, footnotes and citations omitted].

[3]In his closing discussion of the public interest consideration, Montrym reports that "the number of licensees refusing the breathalyzer test has been steadily declining since the threat of license revocation resulting from the criminal charge of driving under the influence has almost vanished in the light of the passage of Ch. 505 of the Acts of 1975."

The statistics for the calendar years preceding the district court's injunction in March, 1977, do not reflect a "steady decline":

Conclusion.

For the foregoing reasons and for those argued in the Appellant's original brief, the Court should reverse the judgment of the district court.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
Assistant Attorney General,
MITCHELL J. SIKORA, JR.,
Assistant Attorney General,
STEVEN A. RUSCONI,
Assistant Attorney General,
Department of the Attorney General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1032
Attorneys for the Appellant.

Year	*Refusals of Chemical Test*
1974	6200
1975	6828
1976	6778

(Annual Registry enforcement statistics furnished to Montrym's counsel.)

In all events, the expectation remains inherently reasonable that an intoxicated driver confronting a potentially incriminating test will typically refuse it in the absence of a sure sanction. And that refusal will necessitate an evidentiary proceeding in the local courts processing the volume of cases cited in the Registrar's original brief, 34 nn.41-43.